(1)

No. 96-7901-CFH
Status: GRANTED

Title: Richard F. Trest, Petitioner
v.
Burl Cain, Warden

Docketed:
February 18, 1997

Court: United States Court of Appeals for the Fifth Circuit

Counsel for petitioner: Hudsmith,Rebecca L.

Counsel for respondent: Petersen,Kathleen E.

Entry	Date	Note	Proceedings and Orders
1	Jan 27 1997	G	Petition for writ of certiorari and motion for leave to proceed in forma pauperis filed. (Response due March 20, 1997)
3	Mar 21 1997		Waiver of right of respondent Burl Cain, Warden to respond filed.
4	Mar 27 1997		DISTRIBUTED. April 11, 1997 (Page 20)
5	Apr 9 1997	F	Response requested -- SOC.
6	Apr 17 1997		Brief of respondent Burl Cain, Warden in opposition filed.
7	May 7 1997		REDISTRIBUTED. May 22, 1997 (Page 6)
9	May 27 1997		Petition GRANTED. limited to Question 1 presented by the petition. SET FOR ARGUMENT November 10, 1997. **********
11	Jul 15 1997		Order extending time to file brief of petitioner on the merits until July 31, 1997.
12	Jul 29 1997		Record filed.
		*	Partial record proceedings United States Court of Appeals for the Fifth Circuit.
13	Jul 29 1997	G	Motion of petitioner to enlarge the record filed.
14	Jul 30 1997		DISTRIBUTED. September 29, 1997 (Page 70)
15	Jul 30 1997		Order further extending time to file brief of petitioner on the merits until August 4, 1997.
16	Jul 30 1997		Brief amicus curiae of National Association of Criminal Defense Lawyers filed.
18	Aug 4 1997		Joint appendix filed.
19	Aug 4 1997		Brief of petitioner Richard F. Trest filed.
21	Aug 29 1997		Order extending time to file brief of respondent on the merits until September 19, 1997.
22	Sep 8 1997	G	Motion of respondent to enlarge the record filed.
23	Sep 16 1997		CIRCULATED.
24	Sep 19 1997	X	Brief of respondent Burl Cain, Warden filed.
25	Sep 19 1997	X	Brief amici curiae of Mississippi, Florida, Montana and Nevada filed.
26	Oct 6 1997		Motion of petitioner to enlarge the record GRANTED.
27	Oct 6 1997		Motion of respondent to enlarge the record GRANTED.
28	Oct 21 1997	X	Reply brief of petitioner Richard F. Trest filed.
29	Nov 10 1997		ARGUED.

1PP

96-7901 (2)

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1996

Supreme Court, U.S.
FILED
JAN 27 1997
OFFICE OF THE CLERK

RICHARD F. TREST,
Petitioner

vs.

UNITED STATES OF AMERICA,
Respondent

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SUPREME COURT, U.S.

On Petition for a Writ of Certiorari
to the United States Court of Appeals for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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96-7901

Trest
v.
Cain

QUESTION PRESENTED

1. WHETHER, DESPITE THE STATE'S FAILURE TO RAISE THE AFFIRMATIVE DEFENSE OF PROCEDURAL DEFAULT AT ANY STAGE IN THE FEDERAL HABEAS CORPUS PROCEEDINGS, THE COURT OF APPEALS IS REQUIRED TO RAISE THE DEFENSE *SUA SPONTE* AND IS FORECLOSED FROM REVIEWING THE CLAIM ON THE MERITS BASED UPON ITS CONCLUSION THAT THE CLAIM IS PROCEDURALLY DEFAULTED?

2. WHETHER A FEDERAL COURT HAS JURISDICTION TO REVIEW A CLAIM RAISED IN A FEDERAL HABEAS CORPUS PROCEEDING BY A STATE PRISONER CHALLENGING THE CONSTITUTIONALITY OF HIS CURRENT STATE SENTENCE FOR WHICH HE IS IN CUSTODY ON THE BASIS THAT IT WAS UNCONSTITUTIONALLY ENHANCED BY AN EARLIER, SATISFIED STATE CONVICTION THAT THE PETITIONER CONTENDS IS CONSTITUTIONALLY INVALID AND SHOULD BE DEPRIVED OF ITS COLLATERAL CONSEQUENCE OF ENHANCING THE SUBSEQUENT SENTENCE?

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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1996

RICHARD F. TREST,
Petitioner

vs.

UNITED STATES OF AMERICA,
Respondent

On Petition for a Writ of Certiorari
to the United States Court of Appeals for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

The petitioner, Richard F. Trest, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit, which, on direct appeal, affirmed the district court's denial of petitioner's petition for a writ of habeas corpus to review his Louisiana state sentence.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit sought to be reviewed, *Trest v. Whitley*, 94 F.3d 1005 (5th Cir. 1996), appears as Appendix A.

JURISDICTION

On September 17, 1996, the United States Court of Appeals for the Fifth Circuit rendered its decision on direct appeal of petitioner's conviction and sentence under jurisdictional authority of 28 U.S.C. § 1291. *Trest v. Whitley*, 94 F.3d 1005 (5th Cir. 1996). On October 29, 1996, the court of appeals denied petitioner's petition for rehearing and suggestion for rehearing en banc. *Trest v. Whitley*, 102 F.3d 552 (5th Cir. 1996). Jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 2254(b) bars habeas corpus relief "unless it appears that the applicant has exhausted the remedies available in the courts of the State."

28 U.S.C. § 2241(c)(3) provides that a writ of habeas corpus shall not extend to a prisoner unless "[h]e is in custody in violation of the Constitution or laws or treaties of the United States; . . ."

STATEMENT OF THE CASE

A. Course of Proceedings and Disposition in the Court Below

On September 30, 1991, petitioner Richard F. Trest, a Louisiana state prisoner in custody under a Louisiana enhanced sentence, appearing *pro se*, filed a petition pursuant to 28 U.S.C. Section 2254 for a writ of habeas corpus by a person in state custody. Record on Appeal (hereinafter "R.") at 1. Petitioner challenged the constitutionality of his current Louisiana sentence of 35 years

imprisonment imposed upon him as an habitual offender by the 26th Judicial District Court in Bossier Parish, Louisiana on June 8, 1979. *Id.* In his Memorandum of Law Supporting Application For Writ of Habeas Corpus, petitioner urged, *inter alia*, as grounds in support of the unconstitutionality of his current Louisiana sentence, that the state trial court erred in relying on a 1976 Mississippi conviction in sentencing him as an habitual offender, given that the Mississippi conviction itself was constitutionally invalid. R. at 7, 20 (Claim No. 7, Part B). In support of his writ, petitioner submitted a copy of the Habitual Offender Bill of Information filed against him in the 26th Judicial District Court and the transcript of the hearing on the habitual offender bill. R. at 41-56. Petitioner further alleged that he had filed for post-conviction relief in the 26th Judicial District Court, which was denied on March 26, 1990, and which denial was affirmed by the Louisiana Supreme Court on May 17, 1991. R. at 7. *See also State ex rel. Trest v. Smith*, 580 So.2d 374 (La. May 17, 1991), denying supervisory writs and writs of review from the 26th Judicial District Court in No. 56,595, and *State of Louisiana v. Trest*, No. 56,595 in the 26th Judicial District Court, pleading entitled "Reasons for Denial of Post-Conviction Relief," dated March 26, 1990, denying relief on the merits. Petitioner also alleged that he maintained the same grounds for relief in state post-conviction proceedings as in his federal habeas petition. R. at 3.

The State of Louisiana, in its Answer to Application for Writ of Habeas Corpus, did not specifically respond to the above ground for relief. R. at 65-78. However, the state did acknowledge that petitioner had exhausted his claims, stating: "From a review of the record, it does appear to the State of Louisiana that petitioner does not have any State remedies at this time, and therefore the State admits that petitioner has exhausted all State remedies, including any post conviction relief available to him under Louisiana law." R. at 65.

On February 2,1994, the magistrate judge issued a Report and Recommendation that the petition for writ of habeas corpus be denied. R. at 148, 156. The Report did not address the ground for relief set forth in Claim 7, Part B of petitioner's Memorandum of Law. However, the magistrate judge concluded with respect to the issue of exhaustion:

> Petitioner has exhausted his state court remedies by application for post-conviction relief/writ of habeas corpus in the 26th Judicial District Court, and to the Louisiana Supreme Court which both denied him relief.

R. at 148.

On February 18, 1994, petitioner, again proceeding *pro se*, filed his Objection to Magistrate's Report and Recommendation. R. at 175. In his objections, petitioner, while admitting that the claim was "unskilled and obscurely raised," R. at 176, pointed out that the Report failed to address the Claim 7, Part B issue of the unconstitutionality of his 1976 Mississippi conviction and its consequent unavailability for use in the enhancement of petitioner's sentence under the habitual offender provisions of La. R.S. 15:529.1. In his objections, petitioner further explained that the Mississippi conviction was constitutionally infirm based on the Mississippi trial court's failure properly to inform petitioner, prior to his guilty plea, of his constitutional rights and of the maximum sentence he could receive, in violation of *Boykin v. Alabama*, 395 U.S. 238, 89 S.Ct. 1709 (1969). R. at 177-181. Petitioner attached a copy of the transcript of his guilty plea in Mississippi state court held on May 24, 1976. R. at 182-222.

On May 13, 1994, the district court entered a judgment denying petitioner's application for a writ of habeas corpus. R. at 230. On May 26, 1994, petitioner filed his notice of appeal.

On May 15, 1995, the United States Court of Appeals for the Fifth Circuit appointed undersigned counsel to represent petitioner in the Court of Appeals and directed the filing of

supplemental briefs addressing the issue raised by *Custis v. United States*, __ U.S. __, 114 S.Ct. 1732 (1994), concerning collateral attacks on prior convictions used to enhance a subsequent conviction.

A majority of a panel[1] of the United States Court of Appeals for the Fifth Circuit, raising the defense of procedural default *sua sponte*,[2] affirmed the district court's denial of federal habeas corpus relief to petitioner without reaching the *Custis* issue. *Trest v. Whitley*, 94 F.3d 1005 (5th Cir. 1996), attached as Appendix A. The panel majority concluded that petitioner's claim challenging the constitutionality of the Louisiana enhanced sentence as improperly based on constitutionality invalid underlying prior Mississippi convictions, although exhausted and not procedurally defaulted in the Louisiana state courts, was nonetheless procedurally defaulted because of petitioner's failure to challenge the underlying prior Mississippi convictions in Mississippi state court in a timely fashion under Mississippi post-conviction procedure. *Id.* at 1008-1009. The court concluded that, under this Court's decision in *Coleman v. Thompson*, 501 U.S. 722, 750, 111 S.Ct. 2546, 2565 (1991), a procedural default "will block all federal review of a claim that a conviction was unconstitutional" unless the prisoner can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or can demonstrate that failure to consider the claim will result in a fundamental miscarriage of justice. 94 F.3d at 1009. After having raised the issue *sua sponte* and giving petitioner no opportunity to respond, the court then concludes:

---

[1]The Honorable Robert M. Parker dissented.

[2]The issue was not raised by the appellate court at any point prior to the issuance of the panel opinion, and, thus, parties were never given an opportunity to address the issue of procedural bar.

> In the instant case, Trest neither alleges such cause and prejudice nor a fundamental miscarriage of justice; indeed, Trest has not even attempted to bear this burden. Hence, a federal district court in Louisiana cannot consider Trest's claims that his Mississippi convictions were somehow unconstitutional."

Id.

The panel majority reached this result despite the circumstances that (1) the State of Louisiana never raised the defense of procedural default at any stage of the federal habeas or state post-conviction proceedings, and, in fact, admitted in the federal district court that petitioner had exhausted all federal habeas corpus claims in Louisiana state court; (2) petitioner did, in fact, timely file a Louisiana state post-conviction petition wherein he exhausted all claims, including his challenge to the constitutionality of the Louisiana enhanced sentence as a result of the unconstitutionality of the underlying Mississippi prior convictions, and was not procedurally defaulted by either the Louisiana district or supreme courts, but was denied relief on the merits; and (3) petitioner's federal habeas corpus petition seeks to have the Louisiana enhanced sentence voided and reduced based upon the unconstitutionality of the underlying prior Mississippi convictions, thus depriving the Mississippi convictions of the collateral consequence of enhancing the Louisiana sentence, without necessarily voiding the Mississippi convictions for all purposes, relief which petitioner contends is available under federal habeas corpus review.

In his dissent, the Honorable Robert M. Parker noted that the state, by failing to raise the procedural default as a defense, lost the right to assert that defense. *Id.* The dissent reasoned further:

> In this case, the Louisiana court did not explicitly rely on the Mississippi statute of limitations, nor did the petitioner have the opportunity to rebut any resulting presumption. The majority's observation that Trest did not even attempt to bear his burden of establishing cause and prejudice is central to the flaw in their reasoning. How can this Court penalize Trest for failing to respond to the state's affirmative defense of procedural bar, when the State declined to raise such a defense?

Id.

B. Statement of Facts

In proceedings held in the 26th Judicial District Court for the State of Louisiana on June 8, 1979, petitioner, who had been convicted of armed robbery after a trial by jury, was sentenced to a term of imprisonment of 35 years without benefit of parole, probation or suspension of sentence. R. at 55. In making its sentencing determination, the state district court found that petitioner was a multiple offender as defined by the Louisiana Habitual Offender Law, La. R.S. 15:529.1, based on petitioner's convictions in Mississippi state court in 1976, pursuant to pleas of guilty, which the Louisiana state district court treated as one conviction for purposes of the Habitual Offender Law. R. at 53, 55. *See also* Habitual Offender Bill of Information, R. at 25. Because petitioner was found to be a multiple offender, the state district court concluded that the minimum sentence that it could impose under the Louisiana Habitual Offender Law was one-third of the maximum petitioner could have received as a first offender, or 33 years. R. at 55. *See also* La. R.S. 15:529.1. At the multiple offender proceeding, the petitioner did not object to the Louisiana state district court's reliance on the Mississippi convictions on the basis that they were constitutionally infirm.

The Mississippi state court convictions that formed the basis for the enhancement of petitioner's current Louisiana sentence arose as the result of petitioner's pleas of guilty to five counts of burglary on May 24, 1976, when petitioner was 18 years old. R. at 159, 171, 172. Petitioner was sentenced to serve concurrent four year terms of imprisonment on the five counts and was released from prison in Mississippi in 1978. R. at 125.

In the course of the guilty plea colloquy forming the basis for the Mississippi convictions, petitioner was questioned by the Mississippi state district court judge, along with co-defendants St.

Clair Locke and Tommy Bryant, concerning his waiver of rights. As evidenced by the transcript of that proceeding, the state court judge stated as follows:

> BY THE COURT: All right, boys, do you understand, each of you now, that you are entitled to a jury trial, if you want it, to each of these charges? Do you understand that?
>
> BY THE DEFENDANTS: Yes, sir.
>
> BY THE COURT: These are rights which you have. They are valuable rights. You have a right to a trial by jury and let the jury determine whether or not you are guilty of these charges. Also, you have a right to cause the State to bring witnesses here and testify in open court. That's called the right of confrontation. You have the right to cross-examine these witnesses, you and your attorneys, and you don't have to take the stand. You can, you know, remain silent. And these are valuable rights which you have but which will go by the board, so to speak. They will be waived, if you plead guilty. Do you understand that, Bryant?
>
> BY DEFENDANT BRYANT: Yes, sir.
>
> BY THE COURT: Locke?
>
> BY DEFENDANT LOCKE: Yes, sir.
>
> BY THE COURT: St. Clair?[3]
>
> BY DEFENDANT ST. CLAIR: Yes, sir.

R. at 162. The transcript does not reflect that petitioner responded that he understood each of the constitutional rights waived as the result of a guilty plea, or even that he heard the state judge's statement of those rights as set forth above. Nor does the record reflect that petitioner was informed

[3]According to the transcript of the proceedings, St. Clair is actually the first name of defendant Locke.

of the maximum sentence he could receive as a result of his guilty pleas or of his right to appeal. R. at 164, 165, 170, 171.

REASON FOR GRANTING THE WRIT

I. GIVEN THE STATE'S WAIVER OF THE AFFIRMATIVE DEFENSE OF PROCEDURAL DEFAULT BY FAILING TO RAISE IT AT ANY TIME DURING THE FEDERAL HABEAS CORPUS PROCEEDINGS BELOW, THE COURT OF APPEALS WAS NOT FORECLOSED FROM REVIEWING THE FEDERAL HABEAS PETITIONER'S CLAIM ON THE MERITS DESPITE ITS CONCLUSION THAT THE CLAIM WAS PROCEDURALLY DEFAULTED

At no point in the federal habeas corpus proceedings (or in the state post-conviction proceedings) did the State of Louisiana raise as an affirmative defense to petitioner's attack on the constitutionality of his enhanced Louisiana sentence based on the unconstitutionality of the underlying Mississippi prior convictions that the claim, although exhausted in Louisiana state courts, is procedurally barred in federal habeas corpus because of petitioner's failure to file timely in Mississippi state court for post-conviction review of those Mississippi convictions. Nevertheless, the Fifth Circuit concluded that it was foreclosed from reviewing the merits of petitioner's claim because it viewed the claim as procedurally defaulted and because petitioner (despite the circumstance that he was never given an opportunity) never demonstrated cause and prejudice for the alleged default or a fundamental miscarriage of justice. The appellate court's conclusion in this regard is in conflict with the jurisprudence of other circuits as well as the jurisprudence of this Court.

In *Gray v. Netherland*, ___ U.S. ___, 116 S.Ct. 2074, 2080 (1996), this Court explained that 28 U.S.C. § 2254(b) bars the granting of habeas corpus relief "unless it appears that the applicant has exhausted the remedies available in the courts of the State." Further, if it is clear that at the time of the federal petition that the habeas petitioner's claims are procedurally barred under state law, the

exhaustion requirement is satisfied *Id.* However, "the procedural bar which gives rise to exhaustion provides an independent and adequate state-law ground for the conviction and sentence, and thus prevents federal habeas corpus review of the defaulted claim, unless the petitioner can demonstrate cause and prejudice for the default." *Id.* Nevertheless, as the Court further explained, "procedural default is an affirmative defense" and the state "would have been obligated to raise procedural default as a defense, or lose the right to assert the defense thereafter." *Id.* at 2082.

In the context of the defense of failure to exhaust state remedies, this Court has concluded that the failure does not deprive an appellate court of jurisdiction to consider the merits of a habeas corpus application. *Granberry v. Greer*, 481 U.S. 129, 107 S.Ct. 1671, 1673-74 (1987). As the court explained:

> As the Strickland [*Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052 (1984) case demonstrates, there are some cases in which it is appropriate for an appellate court to address the merits of a habeas corpus petition notwithstanding the lack of complete exhaustion. Although there is a strong presumption in favor of requiring the prisoner to pursue his available state remedies, his failure to do so is not an absolute bar to appellate considerations of his claims.

Id. at 132, 1674. Moreover, where the states raises for the first time on appeal the defense of nonexhaustion, this Court concluded that the appellate court is not required to dismiss for nonexhaustion. *Id.* 133, 1674. Rather, the appellate court should determine whether the interests of comity and federalism will be better served by addressing the merits forthwith or by requiring a series of additional state and district court proceedings before reviewing the merits of the petitioner's claim. *Id.* at 134, 1675.

Other circuits to address the issue of the state's failure to raise the affirmative defense of procedural default have concluded that the state waived the defense and have decided the merits of

the claim. For example, in *Esslinger v. Davis*, 44 F.3d 1515, 1525-28 (11th Cir. 1995), the Eleventh Circuit concluded that the state explicitly waived procedural default defense by asserting in supplemental answer that the petitioner exhausted state remedies and committed no procedural defaults. Under the circumstances, the court of appeals concluded that the district court's *sua sponte* invocation of the procedural default to bar relief, despite the State's waiver, served no important federal interest. *Id.* at 1527 and 1528 n. 45. Finally, the court concluded that it is "fundamentally unfair for a court *sua sponte* to invoke a procedural default without giving the petitioner an opportunity to show cause for the default." *See, e.g., Shaw v. Norris*, 33 F.3d 958, 960 n.3 (8th Cir. 1994) (state's failure to assert procedural default defense in district court constitutes waiver of defense); *Wells v. Maass*, 28 F.3d 1005, 1010 (9th Cir. 1994) (state's failure to assert that either aspect of petitioner's ineffectiveness claim was not raised in state trial court constitutes a waiver of any claim of procedural default that might have arisen from any possible variance between the ineffectiveness claim raised in the state trial court and the one raised on appeal); *Bloyer v. Peters*, 5 F.3d 1093, 1097 (7th Cir. 1993) (procedural default defense waived because state failed to raise it in district court "in a manner reasonably calculated to alert the court that it was asserting a defense based on waiver"); *Bailey v. Cowley*, 914 F.2d 1438, 1439 (10th Cir. 1990) (although "state courts refused to consider the claims on the merits due to petitioner's procedural default," federal court "deem[s] the defense waived and . . . consider[s] the petition on the merits" because state "did not raise petitioner's procedural default as a defense"); *Merlo v. Bolden*, 801 F.2d 252, 255 (6th Cir. 1987) ("state, by failing [in the state appellate courts] to assert procedural default, waived the right to assert it as an independent ground to support [petitioner's] conviction").

Even those decisions that have approved of the federal habeas court's raising the defense of procedural default *sua sponte* despite the state's failure to raise the defense have not required the dismissal of the claim on this basis. For example, in *Hardiman v. Reynolds*, 971 F.2d 500, 503 (10th Cir. 1993), the Tenth Circuit concluded that it is the federal habeas court's prerogative to raise procedural default *sua sponte* even when state expressly "chooses not to assert its interests." The appellate court reasoned that the state procedural default doctrine "substantially implicates important values that transcend the concerns of the parties to an action." *Id.* The court was careful to note, however, that its holding was "only that a court may raise the state procedural bar defense sua sponte, not that it must raise such a defense if the parties fail to raise it on their own." *Id.* at 504. *See, e.g., Ortiz v. Dubois*, 19 F.3d 708, 714 (1st Cir. 1994), *cert. denied*, ___ U.S. ___, 115 S.Ct. 739 (1995) (court of appeal may raise procedural default issue *sua sponte* despite state's failure to raise it); *Washington v. James*, 996 F.2d 1442, 1448 (2d Cir. 1993), *cert. denied*, 510 U.S. 1078, 114 S.Ct. 895 (1994) (same); *Hull v. Freeman*, 932 F.2d 159, 164 n.4 (3d Cir. 1991) (same); *Burgin v. Broglin*, 900 F.2d 990, 997-98 (7th Cir. 1990) (analogizing to *Granberry v. Greer*, 481 U.S. 129, 107 S.Ct. 1671 (1987), court allows state to raise procedural bar that had not been raised in district court because factual basis for procedural bar defense was not reasonably available at time of district court proceeding). *Cf. Henderson v.Thieret,* 859 F.2d 492 (7th Cir. 1988) (although district court is permitted to consider a waiver defense belatedly raised by the state, even to raise that defense *sua sponte*, the court is not permitted to override the state's decision implicit or explicit to forego that defense).

The Fifth Circuit's conclusion that it is foreclosed from considering petitioner's federal habeas claim because of a procedural bar that it has raised *sua sponte* and must dismiss on that basis

rather than decide the merits of the claim, despite the state's waiver of the affirmative defense, is in conflict with the opinions of the other circuits to address this issue. As with the defense of failure to exhaust, a state procedural default is not a jurisdictional defense. *See Reed v. Ross*, 468 U.S. 1, 9, 104 S.Ct. 2901, 2906-07 (1984) ("Our decisions have uniformly acknowledged that federal courts are empowered under 28 U.S.C. § 2254 to look beyond a state procedural forfeiture and entertain a state prisoner's contention that his constitutional rights have been violated."). Further, given that the state can waive the defense by failing to assert it, this Court's decision in *Coleman v. Thompson*, 501 U.S. 722, 111 S.Ct. 2546 (1991), does not require that the appellate court raise the defense *sua sponte* and decide the claim on that basis rather than on the merits.

II. PETITIONER'S CLAIM CHALLENGING THE ENHANCED LOUISIANA SENTENCE ON THE BASIS OF THE UNCONSTITUTIONALITY OF THE UNDERLYING PRIOR MISSISSIPPI CONVICTIONS USED TO ENHANCE THE LOUISIANA SENTENCE, EVEN THOUGH REQUIRING A REVIEW OF THE CONSTITUTIONALITY OF THOSE UNDERLYING PRIOR MISSISSIPPI CONVICTIONS, IS NOT BARRED IN FEDERAL HABEAS CORPUS REVIEW OF THE ENHANCED LOUISIANA SENTENCE FOR WHICH PETITIONER IS IN CUSTODY

It is well-established that the federal district courts have jurisdiction to consider habeas petitions of persons who are "in custody in violation of the Constitution or laws or treaties of the United States." *See Maleng v. Cook*, 490 U.S. 488, 490, 109 S.Ct. 1923, 1925 (1989); 28 U.S.C. Section 2241(c)(3). Under *Maleng*, a habeas petitioner is not "in custody" under a conviction after the sentence imposed for it has fully expired merely because of the possibility that the prior conviction will be used to enhance the sentences imposed for any subsequent crimes of which he is convicted. *Id.* 109 S.Ct. at 1926. However, the Court expressly reserved the issue of whether a prisoner can attack his current sentence by challenging the constitutionality of an earlier, fully

satisfied conviction if the earlier conviction was used to enhance his current sentence. *Id.* 109 S.Ct. at 1927. The federal appellate courts addressing the issue after *Maleng* have concluded that the federal courts do have jurisdiction under 28 U.S.C. Section 2241(c)(3) to review the constitutionality of a prior, fully satisfied conviction if it was used to enhance a current sentence. *See, e.g., Herbst v. Scott*, 42 F.3d 902, 905 (5th Cir. 1995); *Allen v. Collins*, 924 F.2d 88 (5th Cir. 1991); *Young v. Vaughn*, 83 F.3d 72 (3rd Cir. 1996); *White v. Butterworth*, 70 F.3d 573 (11th Cir. 1995); *Gamble v. Parsons*, 898 F.2d 117, 118 (10th Cir.), *cert. denied*, 111 S.Ct. 212 (1990), and authorities cited therein. *See also Custis v. United States*, ___ U.S. ___, 114 S.Ct. 1732, 1746 and n. 7 (1994), Souter, Jr., dissenting ("the Court does not disturb uniform appellate case law holding that an individual serving an enhanced sentence may invoke federal habeas to reduce the sentence to the extent it was lengthened by a prior unconstitutional conviction"). Such a petition, in order to satisfy the "in custody" requirement, (1) must be framed as a challenge to the current conviction and sentence, not the former ones; (2) must be filed in a court with personal jurisdiction and venue to hear a challenge to the current sentence; and (3) must name the petitioner's current custodian as the proper party respondent. Leibman, Section 8.2d, n. 17, p. 201.

A person is in custody in violation of the Constitution if his sentence was enhanced by a conviction obtained in violation of a specific federal right. *See Tucker v. United States*, 404 U.S. 443, 92 S.Ct. 589 (1972); *Burgett v. Texas*, 389 U.S. 109, 88 S.Ct. 258 (1967). This is so because a sentence may not be "founded [even] in part upon misinformation of constitutional magnitude," *Tucker*, 92 S.Ct. at 592, since to do so would be to allow the underlying right to be "denied anew" and to "suffer serious erosion," *Burgett*, 88 S.Ct. at 262. A conviction obtained in violation of the requirement of *Boykin v. Alabama*, 395 U.S. 238, 89 S.Ct. 1709 (1969), that the record affirmatively

disclose that a defendant who pleaded guilty entered his plea intelligently and voluntarily, should be subject to challenge to the extent that the conviction was used to enhance a sentence and further deny the underlying right.

Petitioner's federal habeas corpus writ properly challenged the validity of the Louisiana sentence of 35 years imprisonment, for which he is currently in the custody of the state of Louisiana, on the basis that it was improperly enhanced by constitutionally invalid prior Mississippi convictions. He framed his constitutional challenge as one directed toward the Louisiana sentence and filed the writ in a federal court with jurisdiction and venue to hear the matter. He named the Louisiana state custodian as the party respondent. The claim was exhausted in the Louisiana state courts, which did not deny relief on any procedural basis, including petitioner's failure to challenge timely the Mississippi convictions in Mississippi state court. Petitioner's constitutional challenge to the enhanced Louisiana sentence on the ground that it was enhanced or lengthened on the basis of prior Mississippi convictions obtained in violation of *Boykin v. Alabama,* given that it was not procedurally barred by a Louisiana state court on the basis of petitioner's failure to file for post-conviction relief from the Mississippi convictions in Mississippi court, is a cognizable claim that should be heard by the federal habeas corpus court. Under the circumstances petitioner should be allowed in federal habeas review to challenge the unconstitutionality of the underlying prior Mississippi convictions at least to the extent of depriving those convictions of the collateral consequence of enhancing the Louisiana sentence, without necessarily voiding the Mississippi convictions for all purposes.

CONCLUSION

For all of the foregoing reasons, petitioner RICHARD F. TREST respectfully prays that this Court grant the writ of certiorari and reverse the judgment of the United States Court of Appeals for the Fifth Circuit dismissing his federal habeas corpus petition, and remand for further proceedings, including an evidentiary hearing, on his claim challenging the constitutionality of his enhanced Louisiana sentence on the basis of the unconstitutionality of the underlying prior Mississippi convictions.

RESPECTFULLY SUBMITTED,

REBECCA L. HUDSMITH
Louisiana Bar Number 7052
Federal Public Defender
Western & Middle Districts of Louisiana
102 Versailles Boulevard, Suite 816
Lafayette, Louisiana 70501
Telephone 318-262-6336
Facsimile 318-262-6605

ATTORNEY FOR PETITIONER

APPENDIX A

Richard F. TREST, Petitioner-Appellant,
v.
John P. WHITLEY, Warden, Louisiana State Penitentiary, Respondent-Appellee.

No. 94-40515.

United States Court of Appeals,
Fifth Circuit.

Sept. 17, 1996.

Louisiana prisoner adjudicated an habitual offender filed petition for writ of habeas corpus, alleging that Louisiana trial court erred in relying on prior Mississippi convictions because predicate convictions were unconstitutional. The United States District Court for the Western District of Louisiana, Tom Stagg, J., denied petition, and petitioner appealed. The Court of Appeals, Edith H. Jones, Circuit Judge, held that petitioner was procedurally barred from challenging prior convictions used to trigger career offender enhancement, where challenge would have been time barred in Mississippi state court.

Affirmed.

Robert M. Parker, Circuit Judge, filed dissenting opinion.

[1] HABEAS CORPUS ⇐ 842
197k842
When considering requests for federal habeas corpus relief, Court of Appeals reviews district court's factual findings for clear error, but reviews issues of law de novo.

[1] HABEAS CORPUS ⇐ 846
197k846
When considering requests for federal habeas corpus relief, Court of Appeals reviews district court's factual findings for clear error, but reviews issues of law de novo.

[2] HABEAS CORPUS ⇐ 342
197k342
Louisiana prisoner who was adjudicated an habitual offender on basis of prior Mississippi convictions was procedurally barred from challenging prior convictions on federal habeas review, where claim would have been time barred in Mississippi state court. 28 U.S.C.A. § 2254; Code 1972, § 99-39-5(2).

[3] HABEAS CORPUS ⇐ 314
197k314
If habeas petitioner has failed to exhaust state remedies and state court to which petitioner would have been required to present his claims in order to meet exhaustion requirement would find claims procedurally barred, there is procedural default for purposes of federal habeas.

[4] HABEAS CORPUS ⇐ 401
197k401
Procedural default will bar all federal habeas review of claim that conviction was unconstitutional unless prisoner can demonstrate cause for default and actual prejudice as result of alleged violation of federal law or demonstrate that failure to consider claim will result in fundamental miscarriage of justice.

[4] HABEAS CORPUS ⇐ 404
197k404
Procedural default will bar all federal habeas review of claim that conviction was unconstitutional unless prisoner can demonstrate cause for default and actual prejudice as result of alleged violation of federal law or demonstrate that failure to consider claim will result in fundamental miscarriage of justice.

***1006** Rebecca L. Hudsmith, Asst. Federal Public Defender, Lafayette, LA, for Appellant.

James M. Bullers, Dist. Atty's Office, Benton, LA, for Appellee.

Appeal from the United States District Court for the Western District of Louisiana.

Before JONES, STEWART and PARKER, Circuit Judges.

EDITH H. JONES, Circuit Judge:

Appellant Richard F. Trest ("Trest") appeals the district court's denial of his petition for a writ of habeas corpus. Because his petition raises forfeited claims that are procedurally barred from review by this court, the judgment of the district court is AFFIRMED.

FACTUAL BACKGROUND

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After a jury trial, Trest was convicted in 1979 of armed robbery in Bossier Parish, Louisiana. Three years before this conviction Trest had pleaded guilty to five felony counts of burglary in Mississippi. The Mississippi state court sentenced Trest to serve concurrent four year terms for his offenses, and he was released from prison in Mississippi in 1978. Based on these prior felony convictions for burglary in Mississippi, the Louisiana trial court adjudicated Trest an habitual offender and sentenced him to 35 years imprisonment, without possibility of parole, probation, or suspended sentence. See La.R.S. 15:529.1. Trest concedes that during his habitual offender proceedings he failed to object to the Louisiana court's reliance on the Mississippi convictions on the basis that these convictions were somehow constitutionally invalid. Trest did not appeal his convictions in Mississippi and has never challenged their validity in any Mississippi court, either on direct or collateral appeal. Rather, he served his concurrent sentences until he became eligible for release from prison.

Trest filed his petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 on September 30, 1991. In this petition, Trest alleges for the first time that the Louisiana trial court erred in relying on his prior Mississippi convictions because these predicate convictions were unconstitutional. Specifically, Trest contends, inter alia, that because the Mississippi court purportedly failed to advise him of his constitutional rights and of the maximum sentence he could receive, the convictions used to enhance his Louisiana ***1007** sentence were constitutionally infirm. [FN1] To support his petition, Trest submitted a copy of the habitual offender bill of information filed against him and the transcript of the hearing on this bill. The government did not respond specifically to this potential ground for relief in its answer to Trest's petition. Likewise, the magistrate judge's report and recommendation did not directly address the issue. Trest stressed this silence in his objections to the report and recommendation. While Trest acknowledged that his claim had been poorly articulated, he rearticulated it, and attached for the district court a copy of the transcript of his 1976 guilty pleas in Mississippi state court. After considering Trest's petition for writ of habeas corpus, the district court denied it.

FN1. To buttress the claim that the Mississippi convictions are somehow unconstitutional, Trest relies on Boykin v. Alabama, 395 U.S. 238, 242, 89 S.Ct. 1709, 1711, 23 L.Ed.2d 274 (1969), in which the Supreme Court held that "[i]t was error, plain on the face of the record, for the trial judge to accept petitioner's guilty plea without an affirmative showing that it was intelligent and voluntary."

DISCUSSION

[1] When considering requests for federal habeas corpus relief, this court has frequently explained that we review the district court's factual findings for clear error, but review issues of law de novo. See, e.g., Myers v. Johnson, 76 F.3d 1330, 1333 (5th Cir.1996).

[2] In the instant case, however, this court's decision in Sones v. Hargett, 61 F.3d 410 (5th Cir.1995), precludes us from reviewing the merits of Trest's habeas challenge to the constitutionality of his Mississippi convictions because his petition raises claims that were forfeited by Trest and are procedurally barred from appellate scrutiny. [FN2] In Sones, this court held that an inmate who had been sentenced under Mississippi's habitual offender statute to life in prison without parole was properly denied habeas relief for his claim that his trial counsel was constitutionally ineffective because this claim would have been time barred had it been included in a state petition for habeas and, thus, was procedurally defaulted for purposes of federal habeas. Sones, 61 F.3d at 416.

FN2. Inexplicably, neither of the parties cited Sones or discussed it in their briefs, oral arguments, or memoranda to this court.

The procedural default in Sones is replicated in the instant appeal. As Sones observes, Mississippi imposes the following procedural bar on all efforts at collateral relief from a conviction and sentence:

> A motion for relief under this chapter shall be made within three years after the time in which the prisoner's direct appeal is ruled upon by the Supreme Court of Mississippi or, in case no appeal is taken, within three (3) years after the time for taking an appeal from the judgment of conviction or sentence has expired, or in case of a guilty plea, within three (3) years after entry of the judgment of conviction.

Miss.Code Ann. § 99-39-5(2) (emphasis added);

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Sones, 61 F.3d at 417 (emphasis added); see also, Lott v. Hargett, 80 F.3d 161, 163 (5th Cir.1996). In Odom v. State, 483 So.2d 343 (Miss.1986), the Mississippi Supreme Court declared that this procedural bar applied prospectively to all convictions occurring prior to April 17, 1984, the statute's effective date; hence, Mississippi convictions before April 17, 1984 can be challenged collaterally only if the challenge is filed in a petition for post-conviction relief by April 17, 1987. Sones further explains that Mississippi's procedural bar also extends to constitutional challenges against the predicate convictions triggering habitual offender status:

> the Mississippi Supreme Court has consistently held that an attack on a facially valid prior conviction, used either as an aggravating circumstance in capital sentencing or as a basis for a sentence as a habitual offender, must be brought after sentencing in a petition for post-conviction relief from that prior judgment of conviction.

See Sones, 61 F.3d at 418 n. 14 (emphasis added); see also, Phillips v. State, 421 So.2d 476, 481 (Miss.1982); Culberson v. State, 612 So.2d 342, 343-47 (Miss.1992).

Because Sones did not challenge the prior convictions used to trigger the career offender *1008 enhancement in petitions for post-conviction relief filed within the three-year statute of limitations, this court considered the challenge forfeited. We reasoned that,

> [f]or the first time on appeal, Sones's counsel argues that his prior convictions are void on their face for failing to indicate whether the guilty pleas on which they were based were knowing and voluntary. We consider this novel argument forfeited. Although we may consider a forfeited claim if it presents a purely legal question and if failure to consider it will result in manifest injustice, the issue whether Sones's prior convictions were based on voluntary and knowing pleas is not purely a question of law.... Because this issue thus involves factual as well as legal questions, we will not consider it for the first time on appeal.

Sones, 61 F.3d at 419 n. 18 (citations omitted) (emphasis added); see also, Lott, 80 F.3d at 164-66 (inmate in Mississippi denied federal habeas corpus review of his Boykin claim because Mississippi's procedural default statute is an independent and adequate rule barring such review). [FN3] Indeed, the importance of enforcing Mississippi's procedural bar and of preventing the retrial of the predicate offenses used to trigger a habitual offender enhancement has been reiterated by the Mississippi Supreme Court, which has stressed that

> [i]n fulfilling its mission to determine whether a prior conviction is constitutionally valid for the purpose of enhancing a defendant's sentence, the trial court must not be placed in position of 'retrying' the prior case. Certainly any such frontal assault upon the constitutionality of a prior conviction should be conducted in the form of an entirely separate procedure solely concerned with attacking that conviction. This role is neither the function nor the duty of the trial judge in a hearing to determine habitual offender status.

Phillips v. State, 421 So.2d 476, 481-82 (Miss.1982); Sones, 61 F.3d at 419.

For the same reasons that Sones was procedurally barred from challenging the prior convictions used to trigger his career offender enhancement, Trest is likewise barred. As has been discussed, while Trest was convicted in 1979 for armed robbery in Louisiana, his prior convictions occurred in Mississippi. The Mississippi convictions that provided the basis for the enhancement of the Louisiana sentence arose as a result of Trest's pleas of guilty to five counts of burglary on May 24, 1976. Trest neither appealed these convictions nor challenged them collaterally. Although he was sentenced to serve concurrent four year terms of imprisonment on the five counts, he left prison when he became eligible for release, in February of 1978.

FN3. Indeed, because Sones's attorney could not have raised these forfeited challenges to the prior convictions at sentencing for the enhanced conviction, this court denied Sones's habeas claim that he suffered from constitutionally ineffective counsel. As the panel explained, [c]ounsel therefore could not have successfully challenged the constitutionality of the prior convictions in the sentencing phase; as mentioned above, in Mississippi constitutional challenges to the validity of prior convictions that are not facially invalid must be made collaterally, and Sones has never sought collateral relief from the prior convictions that qualify him as a habitual offender. We perceive no attorney constitutional ineffectiveness.... Accordingly, we reject Sones's contention that denying federal review of his Sixth Amendment claim would result in a fundamental miscarriage of justice. Sones, 61 F.3d at 420. Trest confronts precisely the same predicament as he has never challenged the prior convictions that qualify him as a habitual offender in any post-conviction or collateral proceeding in Mississippi.

[3] Mississippi's procedural bar, the Mississippi Supreme Court, and this court in Sones mandate that Trest had until April 17, 1987 to file a petition for post-conviction relief from his Mississippi convictions. Since Sones did not comply with this requirement, his challenges to the constitutionality of his Mississippi convictions have been procedurally defaulted. Put differently, because the potential remedies in Mississippi courts for the constitutional defects alleged by Sones were rendered unavailable by his own procedural default, federal courts, including those in Louisiana, are barred from reviewing these claims. Sones, 61 F.3d at 416; Lott, 80 *1009 F.3d at 164. As the Supreme Court has instructed,

> [I]f the petitioner failed to exhaust state remedies and the court to which petitioner would be required to present his claims in order to meet the exhaustion requirement would now find the claims procedurally barred, ... [then] there is a procedural default for purposes of federal habeas.

Coleman v. Thompson, 501 U.S. 722, 735 n. 1, 111 S.Ct. 2546, 2557 n. 1, 115 L.Ed.2d 640 (1991).

[4] The only potential remedies available to cure Trest's procedural default are to demonstrate either cause and prejudice for the default or that a fundamental miscarriage of justice will result from our failure to analyze his claims. Again, the Supreme Court has explained that procedural default will block all federal review of a claim that a conviction was unconstitutional unless the prisoner "can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice." Coleman, 501 U.S. at 750, 111 S.Ct. at 2565 (emphasis added). In the instant case, Trest neither alleges such cause and prejudice nor a fundamental miscarriage of justice; indeed, Trest has not even attempted to bear this burden. Hence, a federal district court in Louisiana cannot consider Trest's claims that his Mississippi convictions were somehow unconstitutional. As a result, this court is bound to conclude as we did in Sones: "section 99-39-5(2) functions as an independent and adequate procedural bar to review [of the constitutional claims raised by Trest] in federal court." Sones, 61 F.3d 410, 417-18; see also, Lott, 80 F.3d at 165.

Because this court concludes that it is foreclosed from considering the merits of Trest's habeas petition, we need not decide whether Custis v. United States, 511 U.S. 485, 114 S.Ct. 1732, 128 L.Ed.2d 517 (1994) would entitle Trest, had he not procedurally defaulted, to review in a federal habeas corpus proceeding of his claim that his prior Mississippi convictions were unconstitutional and that, as a result of this alleged constitutional infirmity, his current sentence has been improperly enhanced.

CONCLUSION

For the foregoing reasons, the judgment of the district court denying Trest's petition for federal habeas corpus relief is AFFIRMED.

ROBERT M. PARKER, Circuit Judge, dissenting:

The independent and adequate state ground doctrine applies to bar federal habeas corpus relief when a state court declines to address a prisoner's federal claims because the prisoner has failed to meet a state procedural requirement. Coleman v. Thompson, 501 U.S. 722, 729, 111 S.Ct. 2546, 2553-54, 115 L.Ed.2d 640 (1991). For the independent and adequate state ground doctrine to apply, the state court adjudicating a habeas petitioner's claims must explicitly rely on a state procedural rule to dismiss the petitioner's claims. Sones v. Hargett 61 F.3d 410, 416 (5th Cir.1995). The procedural default doctrine presumes that the state court's express reliance on a procedural bar functions as an independent and adequate ground in support of the judgment. Id. The petitioner can rebut this presumption by establishing that the procedural rule is not strictly or regularly followed. Id.; see also, Moore v. Roberts, 83 F.3d 699 (5th Cir.1996). Additionally, Petitioner might defend his position by demonstrating cause and prejudice for his failure to raise the claim in state proceedings. See Gray v. Netherland, --- U.S. ----, ----, 116

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S.Ct. 2074, 2082, 135 L.Ed.2d 457 (1996). By failing to raise the procedural default as a defense, the State lost the right to assert that defense. Id.

In this case, the Louisiana court did not explicitly rely on the Mississippi statute of limitations, nor did the petitioner have the opportunity to rebut any resulting presumption. The majority's observation that Trest did not even attempt to bear his burden of establishing cause and prejudice is central to the flaw in their reasoning. How can this Court penalize Trest for failing to respond to the state's affirmative defense of procedural bar, when the State declined to raise such a defense?

***1010** For these reasons, I dissent from the majority's holding that petitioner was procedurally barred from challenging the prior convictions.

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APPENDIX B

Signed
Clsd 5/16/94

U. S. DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
FILED
MAY 16 1994
ROBERT H. SHEMWELL, CLERK
BY _____ DEPUTY

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF LOUISIANA

SHREVEPORT DIVISION

RICHARD FRANKLIN TREST

VERSUS

JOHN P. WHITLEY, WARDEN
LOUISIANA STATE PENITENTIARY, ET AL.

CIVIL ACTION NO. 91-2131

JUDGE STAGG

MAGISTRATE JUDGE PAYNE

J U D G M E N T

For the reasons stated in the Report and Recommendation of the Magistrate Judge previously filed herein, having thoroughly reviewed the record, including the written objections filed, and concurring with the Magistrate Judge's findings under the applicable law;

IT IS ORDERED that petitioner's application for a writ of habeas corpus is **DENIED.**

THUS DONE AND SIGNED at Shreveport, Louisiana, this the 13th day of May, 1994.

TOM STAGG, UNITED STATES DISTRICT JUDGE

JUDGEMENT ENTERED 5/16/94
BY C. E. Davis
COPY TO Trest
Bullers

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APPENDIX C

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-40515

U.S. COURT OF APPEALS
FILED
OCT 29 1996
CHARLES R. FULBRUGE III
CLERK

RICHARD F. TREST,

Petitioner - Appellant

versus

JOHN P. WHITLEY, Warden,
Louisiana State Penitentiary

Respondent - Appellee.

Appeal from the United States District Court for the
Western District of Louisiana

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion 09/17/96, 5 Cir., _____), _____F.3d _____)

Before JONES, STEWART and PARKER, CIRCUIT JUDGES.

PER CURIAM:

(X) The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (FRAP and Local Rule 35) the Suggestion for Rehearing En Banc is also DENIED.

( ) The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Judges who are in regular active service not having voted in favor, (FRAP and Local Rule 35) the Suggestion for Rehearing En Banc is also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

Edith H. Jones
United States Circuit Judge

CLERK'S NOTE:
SEE FRAP AND LOCAL RULES 41 FOR STAY OF THE MANDATE.

ROBERT M. PARKER, Circuit Judge, Dissenting

APPENDIX D

5/1000

U.S. DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
FEB 7 1992
BY _____ DEPUTY

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF LOUISIANA

SHREVEPORT DIVISION

RICHARD FRANKLIN TREST — CIVIL ACTION NO. 91-2131

versus — JUDGE STAGG

JOHN P. WHITLEY, WARDEN
LOUISIANA STATE PENITENTIARY, ET AL. — MAGISTRATE JUDGE PAYNE

REPORT AND RECOMMENDATION

Currently before the court is an application for a writ of habeas corpus filed in forma pauperis by pro se petitioner, Richard Franklin Trest, pursuant to 28 U.S.C. §2254. This matter was referred to the undersigned for report and recommendation in accordance with the standing order of this court.

Petitioner challenges his 1979 conviction as a multiple offender (La.R.S. 15:529.1) and a second offender of armed robbery. He was sentenced to 35 years of incarceration without benefit of parole, probation or suspension of sentence by the 26th Judicial District Court, Bossier Parish, Louisiana. He is presently confined in the Louisiana State Penitentiary, at Angola, Louisiana ("Angola"). Named as respondent is the Warden at Angola, John P. Whitley.

Petitioner has exhausted his state court remedies by application for post-conviction relief/writ of habeas corpus in the 26th Judicial District Court, and to the Louisiana Supreme Court which both denied him relief. The petitioner contends that his

(1) M

incarceration is unconstitutional based on the single argument that he was denied due process in violation of the Fourteenth Amendment of the United States Constitution "in that the entire multiple offender proceedings was unconstitutional". More specifically, the plaintiff alleges nine separate errors which he contends violated his constitutional rights:

> "(1) The Trial Court erred by not quashing the multiple offender bill of information as being vindictive by the prosecutor.
>
> "(2) The Trial Court failed to inform petitioner of the right to be tried as to the truth of the multiple offender bill of information as to a "formal hearing".
>
> "(3) The Trial Court failed to inform petitioner of the requirement to say whether the allegations within the multiple offender charge were true.
>
> "(4) The Trial Court erred by allowing defense counsel to enter the not guilty plea to said charge.
>
> "(5) The Trial Court failed to advise petitioner of the right to "remain silent" and not to incriminate himself as to prior felony conviction.
>
> "(6) There was insufficient evidence during Multiple Offender trial to show whether or not the prior felony conviction ended in a pardon.
>
> "(7) The evidence introduced by the State as to prior felony convictions was illegally entered into the evidence.
>
> "(8) The Trial Court erred by ordering said Second Offender sentence to be without parole.
>
> "(9) The Trial Court erred by not indicating the factors it had considered for imposing the sentencing in the record as required by L.S.A.-C.Cr.P. Article 894.1."

Claim No. 1

At the hearing on the habitual offender bill of information, held on June 8, 1979, the defense attorney called the prosecutor to the stand concerning plea discussions prior to the trial of the

primary charge of armed robbery. The prosecutor testified that if the defendant pled guilty as charged, that he would not be prosecuted as a multiple offender, but that if he elected to go to trial and lost, he would be prosecuted as a multiple offender. See Tr. 5-8.

The defendant cites **Hayes v. Cowen**, 547 F.2d 42 (5th Cir. 1976), which presents a different factual situation from the instant case. In Hayes, supra, the prosecutor increased the original charges to a more serious offense after the defendant's refusal to plead guilty. The facts of this case are different from those presented to the court in Hayes. Here, the defendant was prosecuted under an existing indictment. Defense counsel was advised that the defendant had a choice of pleading guilty as charged without facing the enhanced penalty provisions of L.R.S. 15:529.1, or going to trial and risking the possibility of an enhanced penalty if he was found guilty. This was part of a plea bargaining process, in which prosecutors have reasonable flexibility. An offer to forego pursuing a multiple offender bill is within constitutional limits. See Bordenkircher v. Hayes, 434 U.S. 357, 98 S.Ct. 663 (1978). Furthermore, the prosecutor need not have even made the choice until after the trial, without ever having given the defendant a choice. See La.R.S. 15:529.1 As such, the court does not find that the defendant's constitutional right to due process was violated by the actions of the prosecutor.

Claims 2, 3 and 4:[1]

In these claims, the petitioner contends that: (1) the trial court failed to inform him of his right to be tried as to the truth of the multiple offender allegations; (2) the trial court failed to inform him of the requirement to say whether the allegations were true; and (3) the trial court erred in allowing the defense counsel, rather than petitioner himself, to enter the plea.

The Constitution requires that, in sentencing procedures, a state provide an alleged habitual criminal with reasonable notice and an opportunity to be heard. See Gardner v. Florida, 430 U.S. 349, 358, 97 S.Ct. 1197, 1205 (1977). Louisiana has enacted R.S. 15:529.1 which contains procedures to be followed for habitual offender proceedings.

In this case, the State followed the provisions of 15:529.1 in that the defendant was given notice by the State filing a formal bill of information, alleging that the defendant was a multiple felony offender, with the bill also setting out the details of his prior felony convictions. (See State's Answer, Attachment No. 5) The defendant was thereafter called before the court to answer this bill of information, at which time the defendant waived arraignment and through counsel entered a plea of not guilty to the habitual

---

[1] The court fails to see any constitutional significance in the allegations in claims 2 and 3 and considers claim 4 to encompass whatever objection the plaintiff intended to make in claims 2 and 3. There are no technical, statutory, constitutional or magic words which the judge is required to recite. It is sufficient that the defendant was presented with the charges and asked to plead and then given an opportunity to refute those charges should he have chosen.

offender bill. (See State's Answer, Attachment No. 6) Thereafter a hearing was held and evidence presented from which the court was able to determine that the defendant was in fact a second felony offender. (See State's Answer, Attachment No. 7)

It is sufficient that the defendant was present at the arraignment on the bill with his attorney and that through his attorney he entered a plea of not guilty. Because he denied the allegations, a hearing was subsequently held which provided the defendant a full opportunity to be heard on all matters. There is no authority to suggest that either Louisiana law or constitutional due process requires that the defendant himself has to utter his plea or denial.

Claim No. 5:

The defendant contends that the trial judge knew that a multiple offender charge was forthcoming against the petitioner and failed to advise him not to incriminate himself as to his prior felony convictions during testimony given at the armed robbery trial.

At a habitual offender proceeding, the state must prove, among other things, that the defendant was convicted of a prior felony. See State v. Sylvas, 558 So.2d 1192 (La. App. 1st Cir. 1990). Prima facie proof of a prior felony conviction may be established by compliance with the state's statute. However, this is not the exclusive method of proving a prior felony conviction, and any other competent evidence may be used to establish such proof. See State v. Moten, 510 So.2d 55 writ denied, 514 So.2d 126.

The defendant was clearly under oath and sworn to tell the truth at his armed robbery trial. At that trial, the defendant was represented by counsel. Both the defendant and his counsel were informed by the prosecutor of potential habitual offender charges being brought if the defendant chose to go to trial. The defendant was under oath when he made the incriminating statements, not the subject of an interrogation at which he was unrepresented by counsel. The petitioner's argument is misplaced. Boykin assures that guilty pleas are given voluntarily. Here, the defendant pled guilty neither to armed robbery or the multiple offender bills. A guilty plea in state court is susceptible to a constitutional challenge that it was not voluntarily made if it can be shown that the defendant was not first advised of his privilege against compulsory self-incrimination, the right to trial by jury, and the right to confront his accusers. Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 1709, 1712 (1969). However, the Fourteenth Amendment does not require that a state defendant be informed of habitual criminal charges prior to his conviction on a primary charge. See Westling v. Bennett, 410 F.2d 205 (C.A. Iowa 1969), cert denied, 90 S.Ct. 384; Stewart v. Cunningham, 550 A.2d 96. As such, at the defendant's trial on the primary charges of armed robbery, he was free to testify or not to testify as he chose while the court had no duty to warn him prior to his testimony that the State of Louisiana might file a habitual offender bill. Since the statements clearly were not taken in violation of any constitutional protections, neither does their introduction as evidence of

his prior convictions for purposes of the habitual offender sentencing offend the Constitution. The only due process requirements attached to the multiple offender hearing are that the defendant be given notice and a chance to controvert the allegations and both were complied with. There was no constitutional violation involved. Furthermore, the court finds that the Boykin decision is totally inapplicable here since, with the assistance of counsel, the defendant exercised his rights to refute the charges both as to the primary charges and as to the habitual offender bill.

Claim No. 6:

Under Louisiana law relating to habitual offender proceedings, it is required that the prior felony conviction and the defendant's identity be proved. In this case, the state presented evidence which established defendant's prior felony convictions sufficiently to satisfy constitutional safeguards. Whether or not a prior felony conviction ended in a pardon is not upon the state to prove. Should the defendant contend he had been pardoned, the burden would have fallen on him to make this assertion and establish it to the satisfaction of the court. See Foots v. State of Louisiana, 793 F.2d 610 (5th Cir. 1986).

Claim No. 7:

Defendant alleges that he was determined to be a multiple felony offender on the basis of improper evidence. Fundamental requirements of due process, when a habitual criminal statute is to be invoked, are reasonable notice and an opportunity for a full

and complete hearing with the right to the aid of competent counsel. See Johnson v. State of Kansas, 284 F.2d 344 (8th Cir. 1960). The evidence presented in this case included conviction records from the State of Mississippi with fingerprints. The State also presented an expert witness who positively identified the fingerprints in the conviction records to match those of the defendant. The court did consider as well the defendant's testimony at his primary trial and concluded that the defendant was the same person and was therefore a second felony offender. This procedure, as dictated by the laws of the State of Louisiana, meets the due process requirements of the Fourteenth Amendment to the Constitution.

Claims No. 8 and 9:

After determining that defendant was a second felony offender, the court concluded the penalty range to be from 33 years to 198 years, without benefit of parole or suspension of sentence. In determining the exact number of years, the trial judge should apply the provisions of the Code of Criminal Procedure, Art. 894.1. Section 64 of the Louisiana Criminal Code mandates that the court impose a sentence in armed robbery cases of not less than 5 years nor more than 99 years and further requires that the sentence be without benefit of parole, probation or suspension. The sentencing guidelines for determining appropriate sentences in a particular case are set forth in Louisiana Code of Criminal Procedure, art.

894.1. The defendant argues that R.S. 15:529.1(A)(i),[2] the Multiple Offender Statute, does not prohibit parole for Second Offenders, and, as such, the trial judge erred in prohibiting parole. The petitioner's original sentence was for Armed Robbery, R.S. 14:64, a sentence which prohibits parole. The judge's apparent interpretation of the laws, when applied in conjunction, gave him the discretion to allow for parole according to the circumstances. That the petitioner disagrees with the judge's interpretation provides no basis for federal habeas corpus relief since no question of a constitutional nature is raised. Carrizales v. Wainwright, 699 F.2d 1053 (1st Cir. 1983); Jones v. Theriot, 846 F.2d 457 (7th Cir. 1988).

The petitioner further argues that the trial court erred by not indicating the factors it had considered for imposing the sentencing in the record as required by C.Cr.P. art. 894.1. This court is also foreclosed from consideration of the alleged failure to follow the state's sentencing procedures because such failure is not a constitutional question reviewable on a federal habeas corpus petition. Jones v. Estelle, 622 F.2d 124, 126 (5th Cir. 1980), cert. denied, 449 U.S. 996, 101 S.Ct. 537 (1980).

Accordingly,

IT IS RECOMMENDED that the petition for a writ of habeas corpus be **DENIED.**

---

[2] La.R.S. 15:529.1(A)(1) provides in part: "... upon conviction of a second felony offense, such person shall be eligible for parole consideration upon serving one-half of the sentence imposed."

Objections

Under the provisions of 28 U.S.C. §636(b)(1)(C) and Fed.R.Civ. Proc. 72(b), parties aggrieved by this recommendation have ten (10) business days from service of this report and recommendation to file specific, written objections with the Clerk of Court. A party may respond to another party's objections within ten (10) days after being served with a copy thereof. Counsel are directed to furnish a courtesy copy of any objections or responses to the district judge at the time of filing.

Failure to file written objections to the proposed findings and recommendations contained in this report within ten (10) business days from the date of its service, or within the time granted pursuant to Fed.R.Civ.Proc. 6(b), shall bar an aggrieved party from attacking the factual findings on appeal except upon grounds of plain error or manifest injustice. See Thomas v. Arn, 474 U.S. 140, 106 S.Ct. 466 (1985); Carter v. Collins, 918 F.2d 1198, 1203 (5th Cir. 1990).

THUS DONE AND SIGNED at Shreveport, Louisiana, on this the 2d day of February, 1994.

ROY S. PAYNE
UNITED STATES MAGISTRATE JUDGE

COPY SENT
DATE 2-2-94
BY cm
TO: Trial Bullers

APPENDIX E

U. S. DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
FILED
FEB 18 1994
ROBERT H. SHEMWELL, CLERK
BY
DEPUTY

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF LOUISIANA

SHREVEPORT DIVISION

RICHARD FRANKLIN TREST — CIVIL ACTION NO. 91-2131

VERSUS — JUDGE STAGG

JOHN P. WHITLEY, WARDEN (LSP) — MAGISTRATE JUDGE PAYNE

OBJECTION TO MAGISTRATE'S REPORT AND RECOMMENDATION

NOW INTO COURT COMES RICHARD FRANKLIN TREST (Petitioner herein) objecting to Magistrate Judge Payne's Report and Recommendation . Said Report and Recommendation is dated February 2, 1994, and received by Petitioner at the Louisiana State Penitentiary, Angola, Louisiana on or about February 9, 1994. Petitioner objects as follows:

1.

Petitioner's writ of habeas corpus raised nine (9) specific claims and the Report and Recommendation recommended that all nine claims be dismissed. Therefore, Petitioner will make a general objection relative to all nine (9) claims.

2.

Petitioner, (like many, who are incarcerated in the Louisiana State Penitentiary, Angola, Louisiana) is not knowledge in the science of law. Petitioner had been assisted by one of Angola's Writ Writers. Claim 7 in the writ is based upon two parts, titled A and B. The Report and Recommendation did not address section B of claim 7. A review of the writ(s) that were raised in State and

Federal Court; unskilled and obscurely raised in subsection B of Claim 7 is a substantial violation that warrants review by this court. In essence, Petitioner has raised the issue that his prior conviction in the State of Mississippi was judicial deficient in that the prior guilty plea was unconstitutional, because it did not comply with constitutional safe-guards.

3.

Petitioner is currently incarcerated in the Louisiana State Penitentiary, Angola, Louisiana. Petitioner was charged by Bill of Information for Armed Robbery, a violation of LSA-R.S. 14:64. After the conclusion of trial, Petitioner was found guilt. The State of Louisiana then filed a Multiple Offender Bill of Information under the provisions of LSA-R.S. 15:529.1 charging Petitioner as a Second Offender. Petitioner was subsequently convicted and sentenced to an enchancement term of thirty-five (35) years without benefit of parole, probation, or suspension of sentence due to Petitioner's prior guilty plea in the State of Mississippi. Petitioner asserted this claim in section B of Claim 7 in his post conviction/writ of habeas corpus in the State Court(s), and maintained the exact posture in this court. The claim resting in muddy waters is nevertheless well preserved. However, the Magistrate Judge's Report and Recommendation failed to address this claim, Petitioner objects and moves for review of this claim.

4.

The State of Louisiana denied Petitioner due process of law when failing to comply with the standards announced in State v.

Santiago, La. 416 So. 2d 524 that a guilty plea in a Louisiana State Court subsequent to December 8, 1971 (date of State ex rel. Jackson v. Henderson, 260 La. 90, 255 So. 2d 85 (1971) became final) may not be used to enhance punishment in a habitual offender proceedings unless the record affirmatively discloses that the plea was constitutionally valid. State v. Holden, 375 So. 2d 1372 (La. 1979).

The State Court(s) failed to hold an evidentiary hearing on this claim.

5.

On May 24, 1976 in the State of Mississippi, Country of Jackson, Pascagoula, Mississippi in the Circuit Court of Jackson County, Mississippi with the Honorable Darwin M. Maples, Presiding Judge appeared three teen-age defendants ages 17 and 18 by the name of St. Clair Locke, Richard Trest, and Tommy Bryant. Each defendant was represented by counsels.

The three teen-age defendants entered guilty pleas and the court subsequently imposed sentence.

The guilty plea entered by Richard Trest is constitutionally deficient in that the plea does not conform to Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 1709.

The Court failed to advise Petitioner that:

1. By pleading guilty, he waived his rights to trial by jury, privilege against compulsory self-incrimination, and his right to confront accusers. See Page 5 of the Mississippi Boykin transcript attached. The record indicates that the court advised the two codefendants, but did not petitioner to these basic

rights.

The United States Supreme Court held in McCarthy v. United States , 89 S.Ct. 1166 (1969) that a defendant who waives these basic rights, it must be an intentional relinquishment or an abandoment of a known right or privilege. Johnson v. Zerbst, 304 U.S. 458, 464, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938). Consequently, if a defendant's guilty plea is not equally voluntary and knowing, it has been obtained in violation of due process and is therefore void. Moreover, because a guilty plea is an admission of all the elements of a formal criminal charge, it cannot be truly voluntary unless the defendant posses an understanding of the law in relation to the facts.

2. The court failed to inquire if the plea was voluntarily, coecered, or as a results of threats and intimidation.

3. The court failed to advise that if Petitioner elected to be tried by jury and found guilty that he would have a right to appeal. And, if he couldn't afford an attorney, one would be appointed.

4. The court failed to advise Petitioner of the minimum and maximum sentence. See the following excerpt given by the court:

BY THE COURT

I could give some of you up to ten or thirty or forty years in the penitentiary; this is the type of crime you have committed. It's very serious. (See Miss. Boykin Tr. p. 8 attached).

In Fortia v. United , 456 F. 2d 194 (1972), the Court held that the records did not show that Fortia was informed of the maximum possible sentences that could be imposed. A guilty plea

is invalid as not being understanding entered if a defendant does not know the maximum penalty possible for the offense. United States ex rel. Hill v. United States, 5th Cir. 1971, 452 F. 2d 664, United States v. Perwo, 5 Cir. 1970, 433 F. 2d 1301.

The Louisiana Supreme Court set the standards in State v. McGinnis, La. 413 So. 2d 1307 as to non-Louisiana and federal pleas of guilty. On rehearing this court held that the records failed to show that the defendant was ever informed of his privilege against self-incrimination in the prior conviction which was later used for enhancement purpose in a Louisiana Multiple Offender hearing. The court reversed and remanded.

5. Court gave contradictory instructions as to the charges pending against Petitioner and Tommy Bryant. See the following excerpt:

BY THE COURT

All right, Trest and Bryant, you have been indicted on four charges, and the other defendant, Locke, you have been indicted on me. Do you understand that? (Miss. Boykin Tr. page 2, Lines 6-9)

BY THE COURT

Now, the other two defendants, you are charged with burglary and larcency on five offenses. Do you understand that, Bryant? Trest? (Miss. Boykin Tr. p. 6, Lines 15-17).

The Court had explained to St. Clair Locke that he was charged with one count. See (Miss. Boykin Tr. pp. 2 & 6).

In Banks v. McGougan, 717 F. 2d 186 (1983) the court held at p. 190-191 that it is necessary, however that the record show that the plea was intelligently and voluntarily made citing McChesney

v. Henderson, 484 F. 2d 1101, 1106 (5th Cir. 1973), cert. denied, 414 U.S. 1146, 94 S.Ct. 901, 39 L.Ed. 2d 102 (1974).

6. The Court failed to informed Petitioner of the essential elements of the crime even tho the court requested a recitation of the facts of each offense.

The constitution requires that the accused be informed of the elements of the crime charged. Henderson v. Morgan, 426 U.S. 637, 96 2253, 49 L.Ed. 2d 108 (1976).

In Boykin v. Alabama, supra the court held that a guilty plea is not valid unless it is an intelligent and voluntary choice on the part of the accused. The Boykin decision explains that a guilty plea constitutes a conviction without a trial; for that reasons, a defendant should be made aware of the rights that are automatically waived by choice to forego trial; the privilege against compulsory self-incrimination; the right to trial by jury; and the right to confront one's accusers. As interpreted by the La. S.Ct., the Boykins decision requires "an express and knowing waiver of at least these three federal constitutional rights". State ex rel Jackson v. Henderson, supra.

The decision to plea guilty is not deemed an intelligent and understanding choice unless the defendant is informed of the rights which attach at trial. While an understanding of the triad of rights may be the sine qua non for the acceptance of a guilty plea, it is also true that other factors may have a bearing on the validity of the plea. A mere recitation of rights does not always insure the intelligent and voluntary nature of the plea. For evidentiary purposes, the record must contain an affirmative

showing that demonstrates the understanding and voluntary nature of the plea. State v. Halsell, 403 So. 2d 688 (La. 1981).

For the reasons cited herein this Court is respectfully requested to consider section B of Claim 7. The issues presented herein are not new, the claim was properly raised and preserved throughtout the course of the post conviction/writ of habeas corpus application - the essential facts were raised unskillfully and obsured, but nevertheless raised and preserved.

WHEREFORE a review and disposition is warranted. Petitioner submits that he is entitled to relief.

Respectfully submitted,

Richard Franklin Trest
D.O.C. #91171
Pine #4
La. State Penitentiary
Angola, Louisiana 70712

prepared by:

Walter Burnette
and
G. Ashanti Witherspoon
Inmate Counsels
Legal Program's Criminal Ligitation Team
Louisiana State Penitentiary
Angola, Louisiana 70712

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy fo the foregoing pleading has been served upon Mr. James M. Bullers, District Attorney, 26th Judicial District, Bossier Parish Courthouse, Benton, Louisiana 71006 via United States Mail, postage prepaid, first class on this 12th day of February, 1994.

Richard Franklin Trest

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1996

RICHARD F. TREST,
Petitioner

vs.

UNITED STATES OF AMERICA,
Respondent

On Petition for a Writ of Certiorari
to the United States Court of Appeals for the Fifth Circuit

CERTIFICATE OF SERVICE

I, Rebecca L. Hudsmith, a member of the Bar of this Court, hereby certify that on this 27th day of January, 1997, one copy of the Petition for Writ of Certiorari and of the Motion For Leave To Proceed *In Forma Pauperis* in the above-entitled case was mailed, first class postage prepaid, to the following: James M. Bullers, District Attorney, 26th Judicial District Court, Post Office Box 69, Benton, Louisiana 71006, counsel for respondent herein.

I further certify that all parties required to be served have been served.

Rebecca L. Hudsmith

Rebecca L. Hudsmith
Federal Public Defender for the
Middle and Western Districts of Louisiana
102 Versailles Blvd., Suite 816
Lafayette, Louisiana 70501
Telephone: (318) 262-6336
Facsimile: (318) 262-6605

Attorney for Petitioner

No. 96-7901

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1996

RICHARD F. TREST,
Petitioner

vs.

UNITED STATES OF AMERICA,
Respondent

On Petition for a Writ of Certiorari
to the United States Court of Appeals for the Fifth Circuit

CERTIFICATE OF SERVICE

I, Rebecca L. Hudsmith, a member of the Bar of this Court, hereby certify that on this 12th day of February, 1997, one copy of the corrected Petition for Writ of Certiorari and of the Motion For Leave To Proceed *In Forma Pauperis* in the above-entitled case was mailed, first class postage prepaid, to the following: James M. Bullers, District Attorney, 26th Judicial District Court, Post Office Box 69, Benton, Louisiana 71006, counsel for respondent herein.

I further certify that all parties required to be served have been served.

Rebecca L. Hudsmith

Rebecca L. Hudsmith
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Rebecca L. Hudsmith
Federal Public Defender

Wayne J. Blanchard
Joseph R. Streva, Jr.
Assistant Federal Public Defenders

(318) 262-6336
Fax (318) 262-6605

February 12, 1997

RECEIVED
FEB 18 1997
OFFICE OF THE CLERK
SUPREME COURT, U.S.

Clerk
Supreme Court of the United States
Washington, D.C. 20543

Re: *Richard F. Trest v. John P. Whitley, Warden*

Dear Clerk:

As per your request in your letter dated January 31, 1997 regarding the above entitled petition for writ of certiorari, enclosed please find one (1) original and ten (10) copies of the MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS* and one (1) original and ten (10) copies of the PETITION FOR A WRIT OF CERTIORARI for re-filing of this matter.

The appendix index has been corrected to include the order denying the rehearing (Appendix C), the report and recommendation of the magistrate (Appendix D) and the objection to the report and recommendation (Appendix E), as required by Rule 14.1(i) and Rule 14.1(i)(iii).

A copy of the corrected above-entitled petition has been served on opposing counsels.

Sincerely,

Rebecca L. Hudsmith
Federal Public Defender for the
Western and Middle Districts of Louisiana

RLH:cma
Enclosures

FEDERAL PUBLIC DEFENDER
WESTERN and MIDDLE DISTRICTS OF LOUISIANA
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Rebecca L. Hudsmith
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(318) 262-6336
Fax (318) 262-6605

January 27, 1997

Clerk
Supreme Court of the United States
Washington, D.C. 20543

Re: *Richard F. Trest v. United States of America*
In the Supreme Court of the United States of America

Dear Clerk:

In regard to the above captioned matter, enclosed please find one (1) original and ten (10) copies of the MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS* and one (1) original and ten (10) copies of the PETITION FOR A WRIT OF CERTIORARI for the filing of this matter.

Sincerely,

Rebecca L. Hudsmith
Federal Public Defender for the
Western and Middle Districts of Louisiana

RLH:cma

Enclosures

RECEIVED
JAN 31 1997
OFFICE OF THE CLERK
SUPREME COURT, U.S.

ORIGINAL

Supreme Court, U.S.
FILED
APR 17 1997
CLERK

NO. 96-7901

IN THE
SUPREME COURT OF THE UNITED STATES

RESPONSE REQUESTED

RICHARD F. TREST,
Petitioner

VERSUS

UNITED STATES OF AMERICA
Respondent

On Petition for a Writ of Certiorari
to the United States Court of Appeals for the Fifth Circuit

ANSWER BY STATE OF LOUISIANA OPPOSING PETITION FOR A WRIT OF CERTIORARI

JAMES M. BULLERS
LOUISIANA BAR ROLL #3643
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Attorney for State of Louisiana

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ATTACHMENTS:

1. EXHIBIT A: Trial Court Transcript of Multiple Offender Hearing Criminal Docket No. 56595, 26th Judicial District Court, Bossier Parish, Louisiana
2. EXHIBIT B: Louisiana Habitual Offender Law, L.R.S. 15:529.1
3. EXHIBIT C: Louisiana Armed Robbery Statute, L.R.S. 15:64

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ANSWER FILED ON BEHALF OF THE STATE OF LOUISIANA
IN OPPOSITION TO PLAINTIFF'S PETITION FOR A WRIT OF CERTIORARI

A.

STATEMENT OF THE CASE

Richard F. Trest was convicted of armed robbery in March of 1979 in the 26th Judicial District Court for Bossier Parish, Louisiana. Mr. Trest testified on his own behalf at trial and during his testimony admitted under oath he had been convicted of burglaries in the State of Mississippi in 1976, served time in the Mississippi State Penitentiary and was released on February 2, 1978. After his Louisiana conviction, the State filed a habitual bill of information alleging that the defendant was a second felony offender due to his previous conviction in Mississippi for burglary. The defendant was served with this bill of information, pled not guilty and after trial thereon was deemed to be a second felony offender. The Court thereafter sentenced the defendant to 35 years at hard labor without benefit of probation, parole or suspension. The penalty for armed robbery in the State of Louisiana is a minimum of five (5) years to a maximum of ninety-nine (99) years, all of which is without the benefit of probation, parole or suspension of sentence. The defendant's conviction and sentence was affirmed by the Louisiana Supreme Court and defendant thereafter filed numerous petitions for post conviction relief. All of these were denied and defendant then pursued his cause in Federal Court by Habeas Corpus proceedings.

The defendant alleged in his Federal Petition, as Claim No. 7, "the evidence introduced by the State as to prior felony convictions was illegally entered into evidence."

This was previously alleged by Trest in State court post conviction relief applications, to no avail.

The State contended and the Louisiana Courts agreed that the defendant's habitual offender proceedings complied with minimum due process requirements guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution. Likewise, the United States District Court for the Western District of Louisiana, Shreveport Division, found the habitual offender proceeding brought against the defendant by the State of Louisiana passed constitutional muster and the defendant's petition for Federal Habeas Corpus relief was denied. Trest took an appeal to the Fifth Circuit U.S. Court of Appeal and that court also denied him Federal Habeas relief.

The State of Louisiana shows that it believed petitioner had exhausted State remedies at the time that he filed his Federal Habeas Corpus proceedings in the U.S. District Court, Shreveport Division. Trest had styled his objection in # 7 as an objection to evidence presented by the State at his habitual offender trial. The Louisiana Courts ruled against this as well as the rest of Trest's claims for relief. The State has always contended all matters introduced at this hearing, including evidence as to his prior felony conviction, were properly admitted by the Court.

A.

ARGUMENT

1. **DID THE STATE WAIVE ANY DEFENSE HEREIN AS CONTENDED BY COUNSEL FOR TREST?**

Trest attacked his Louisiana armed robbery conviction and sentence on numerous grounds through numerous writs. One of these attacks filed in the State Court on January

17, 1990, was styled "*Motion to Correct an Illegal Sentence*". Item 7 in this pleading alleged "Evidence introduced by the State as to prior felony convictions was illegally entered into evidence."

The State denied these allegations based on the lower court records, which showed fundamental due process had been satisfied as to the habitual offender proceedings brought against Trest by the State of Louisiana. No court reviewing this matter to date has found otherwise.

The defendant made a collateral attack on his Mississippi burglary conviction which was part of his argument in his January 17, 1990 pleadings that evidence of the burglary conviction was illegally admitted by the Louisiana Trial Judge. The record of this hearing is attached hereto as Exhibit A. The record shows that the Louisiana Trial Judge properly admitted evidence of the defendant's Mississippi burglary conviction.

Upon reviewing Trest's January 17, 1990 pleadings, the Louisiana lower court termed this a technical objection without merit. The State shows this ruling was correct and that this was an improper collateral attack by Trest on his Mississippi burglary convictions.

The State of Louisiana has contended at all proceedings herein that the Mississippi convictions were admissible under all applicable laws. The State of Louisiana therefore contends that it has waived no grounds regarding the admissibility of defendant's Mississippi conviction at the habitual offender hearing or at any other time.

The focus here should be on whether or not Trest received fundamental due process in the Louisiana habitual offender proceedings against him. The record clearly shows that he did. Trest was given reasonable notice and an opportunity for a full and

complete hearing with the assistance of competent counsel. There was no question that Trest was in fact the same person that committed the burglaries in Mississippi and that he was represented by counsel at the time that these pleas were entered.

The Fifth Circuit relied on Sones v. Hargett, 61 F.3d 410 (5th Cir.1995) and held that Trest could not now collaterally attack his Mississippi burglary convictions for the same reasons set out in the Sones decision. Although the State of Louisiana did not cite the Sones decision, it contended at all stages of these proceedings that Trest's Mississippi burglary convictions were constitutionally sound, properly documented and were therefore correctly admitted into evidence by the Louisiana Trial Judge for consideration at the habitual offender proceedings.

The Fifth Circuit's reasoning in the instant case is basically one of finality of judgment. Since Trest has no standing in Mississippi to attack his burglary convictions, they should be considered final and not subject to collateral attack in other courts. Trest likewise alleges that he did not fully understand what he was doing when he pled guilty to Mississippi burglaries. As the Fifth Circuit pointed out in the Sones decision, this involves the factual as well as a legal issue and should not be considered for the first time on appeal. The Fifth Circuit's decision in Trest is sound and should not be disturbed by this Honorable Court.

A review of these entire proceedings leads to the inescapable conclusion that Trest was fairly treated by the State of Louisiana in all proceedings against him and there was no fundamental miscarriage of justice regarding his conviction or sentence.

ARGUMENT

2. IS TREST'S CLAIM PROPERLY REVIEWABLE IN FEDERAL HABEAS CORPUS PROCEEDINGS?

On appeal from U.S. District Court, the Fifth Circuit requested both counsel to address what application, if any, Custis v. U.S., 114 S.Ct., 1732 (1994) had to the Trest case. However, since the Fifth Circuit decided the case on the basis of Sones it did not consider the Custis issue, that is whether Trest was entitled to relief under Federal Habeas Corpus Statutes.

A review of the applicable statutes and jurisprudence pertaining thereto, clearly shows that Trest lacks Federal Habeas Corpus jurisdiction. Trest was not "in custody" for the purposes of his Mississippi convictions and therefore is barred from collaterally attacking those convictions. In Custis the court stated at Page 1738 as follows:

> "Custis invites us to extend the right to attack collateral prior convictions used for sentence enhancement beyond the right to have appointed counsel established in Gideon. We decline to do so."

The Custis decision bars collateral attack by Trest unless and only unless he did not have counsel at the time of his Mississippi convictions. This is clearly not the case.

Custis was ultimately determined to be still "in custody" for the purposes of his State conviction at the time of his Federal sentencing. By contrast, Richard F. Trest was not in custody in Mississippi when he committed armed robbery in Louisiana. Trest had fully completed his Mississippi sentence and they were no way related to the offense later committed in Louisiana. Therefore Trest's custodial situation is distinguishable from that of Custis and Trest cannot now collaterally attack his Mississippi convictions under

Federal Habeas Corpus, except on the basis of failure to have appointed counsel as an indigent.

The State also relies on Charlton v. Morris, 53 F.3d, 929 (8th Cir., Minnesota 1995). This case presents a situation identical to that of Trest's. The court found that Charlton was no longer in custody for a 1982 State conviction and therefore held that he could not collaterally attack his prior conviction, unless such attack was based on grounds of failure to appoint him counsel as an indigent.

Also, in Garlotte v. Fordice, 115 S.Ct., 1948 (May 30, 1995), the court again recognized that a defendant must be in custody under the conviction within the meaning of the Federal Habeas Statute, 28 U.S.C., Section 2254 (a). In the Garlotte case, the defendant was serving a sentence for marijuana conviction followed by a concurrent life sentences on two murder convictions. The court discussed the applicable law and held that Garlotte was still in custody under his marijuana conviction since he was still incarcerated under consecutive sentences. Since Trest had fully completed his Mississippi burglary sentences, had been released and went to Louisiana, his Mississippi sentence had therefore fully expired. He was not in the same circumstances as Garlotte, that is, "in custody."

It is also interesting to note in the Garlotte case that the court specifically discussed the applicability of Maleng v. Cook , 109 S.Ct.1923, which was decided in 1989. On Page 1951 of the Garlotte decision, the Court said as follows:

> The question presented in Maleng was "whether a Habeas petitioner remains 'in custody' under a conviction after the sentence imposed for it has fully expired, merely because of the possibility that the prior conviction will be used to enhance the sentences imposed for any subsequent

> crimes of which he is convicted."... we held that the potential use of a conviction to enhance a sentence for subsequent offenses did not suffice to render a person "in custody" within the meeting of the Habeas Statute.

As applied to Trest, since he was not in custody from his Mississippi burglary convictions at the time of the Louisiana proceedings against him and since he had court appointed counsel for his Mississippi burglaries, he has no right to colaterally attack his prior convictions used at the Louisiana sentence enhancement proceedings.

C.

CONCLUSION

The Fifth Circuit correctly determined that Trest was not entitled to Federal Habeas Corpus relief. This conclusion was reached by the Fifth Circuit under its decision in Sones v. Hargett. Not withstanding the Sones decision, Trest would still not be entitled to Federal Habeas Corpus relief under Custis v. United States. The decisions in Custis, Charlton v. Morris, Garlotte v. Fordice and Maleng v. Cook, require that a defendant be "in custody" to be entitled to Federal Habeas Corpus Relief. The only exception would be if Trest did not have court appointed counsel for his Mississippi burglaries. Since Trest was not in custody and did have counsel for his Mississippi convictions, he is not entitled to Federal Habeas Corpus relief, even assuming arguendo, that the Sones decision does not apply.

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NO. 96-7901

IN THE
SUPREME COURT OF THE UNITED STATES

RICHARD F. TREST,
Petitioner

VERSUS

UNITED STATES OF AMERICA
Respondent

On Petition for a Writ of Certiorari
to the United States Court of Appeals for the Fifth Circuit

CERTIFICATE OF SERVICE

I, James M. Bullers, a member of the Bar of this Court, hereby certify that on this ____ day of April, 1997, one copy of the State of Louisiana's Answer opposing Petition for Writ of Certiorari in the above entitled case was mailed, first class postage prepaid to the following: Rebecca L. Hudsmith, Attorney for Petitioner, 102 Versailles Blvd., Suite 816, Lafayette, LA 70501.

I further certify that all parties required to be served have been served.

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EXHIBIT A

IN THE TWENTY-SIXTH JUDICIAL DISTRICT COURT

IN AND FOR THE PARISH OF BOSSIER

STATE OF LOUISIANA

STATE OF LOUISIANA

VERSUS CRIMINAL DOCKET NO. 56595

RICHARD FRANKLIN TREST

EVIDENCE adduced on motion to quash and multiple offender hearing in the above entitled and numbered cause by His Honor, Cecil C. Lowe, Judge for the Twenty-Sixth Judicial District Court, in and for the Parish of Bossier, State of Louisiana, on the 8th day of June, 1979, at Benton, Louisiana.

APPEARANCES

Mr. A. L. Blondeau
Assistant District Attorney
Bossier Parish Courthouse
Benton, LA 71006

Mr. Patrick Phillips
Attorney at Law
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FILED

AUG 19 1989

DEPUTY CLERK
26TH JUDICIAL DISTRICT COURT
BOSSIER PARISH, LOUISIANA

MR. BLONDEAU: Your Honor, state's ready to proceed in multiple offender hearing of Richard Franklin Trest.

THE COURT: Mr. Phillips, is the defendant ready to proceed.

MR. PHILLIPS: May it please the court, before we get in on the hearing on the multiple offender bill of information, I would like at this time to file the motion in arrest of judgment based on a recent United States Supreme Court case requiring unanimous verdict. For a conviction in six man jury cases which I think is applicable to twelve man jury cases, court recalled in this case the jury turned an eleven to one verdict of guilty, and in a recent case of Birch versus Louisiana, it was held that a non-unanimous verdict was a denial of defendant's right to a trial by jury and that such a non-unanimous verdict would not stand. We would suggest to the court that the same principle is applicable in this case, that a non-unanimous verdict is a deprivation of a right to trial by a jury, cannot be allowed to stand.

MR. BLONDEAU: Your Honor, if I may briefly reply to that. I believe that the specific issue Louisiana jury system was rated, I believe it was a case of Duncan versus Louisiana in the United States Supreme Court in where they held that a nine out of twelve on the old Louisiana statute was constitutionally permissible. The case which Mr. Phillips refers to dealt strictly with a six man jury, and I believe that they, they said in the case,

if I'm--if I'm not correct--if I am correct, that, that because of the fact that the six man jury was a minimum amount of jurors that could actually try a person, that in that case it required a unanimous verdict. And I don't believe the case can be read any inferentially as inferring that the ten out of twelve verdict, much less an eleven out of twelve verdict would be unconstitutional under the laws of this state or the United States Constitution.

MR. PHILLIPS: The--The docket case of course to which the state refers was prior to the Birch case of course of course insofar ...(inaudible).. no longer applicable, but my position is and I think that logically is consistent that if five out of six is not constitutionally permissible for a verdict of guilty, then it would not be logical to say that you could double that number and take ten out of twelve and thereby render the verdict constitutional. If five out of six is unconstitutional, then ten out of twelve, or eleven out of twelve, is unconstitutional. It's simply a, a compounding of the error, which the supreme court is Birch versus Louisiana held was not constitutionally permissible. And I think that simply doubling the number of jurors and requiring the same percentage for conviction in a twelve man jury as you do in a six man jury is likewise unconstitutional. I believe that the jury's verdict against this defendant and the pronunciation of guilty is, was an unconstitutional verdict and cannot be allowed to stand. I think that the verdict should be arrested and new trial ordered.

THE COURT: The case referred to ...(INAUDIBLE)...the close reading of that case, that the court goes over its previous ruling first wherein it said five men on the jury was not enough. Then in this particular thing there they indicated that six would be enough in that case. Now in the case you're referring to, they say where you have such a small number of jurors in that instance, they they're dealing in numbers. That it would require a unanimous verdict of the six jurors. However, I believe from the language that they make no comment as to jurors that are twelve in number or larger in number than six. I think that case is dealing with a minimum number and when you're dealing with a minimum that they're going to approve and the number of jurors to handle a case, then they're going to say it's going to have to be unanimous when you're minimum. But no ruling that I can understand in reading that case dealing with the jury of twelve members. Therefore, the motion to arrest the judgment is denied.

MR. PHILLIPS: May it please the court, prior to beginning the hearing on the multiple offender bill of information, I'd like to file a motion to quash the multiple offender--multiple offender bill of information and request opportunity to present evidence on a motion to quash.

THE COURT: I'm going to let you present evidence in connection with it.

MR. PHILLIPS: Call Mr. A. L. Blondeau to the stand.

MADAM CLERK: (SWEARS WITNESS)

ALEXANDER L. BLONDEAU, JR.

Called as a witness by counsel for the defendant, after having been first duly sworn, was examined and testified as follows:

CROSS EXAMINATION

BY MR. PHILLIPS:

Q Will you state your full name please?

A Alexander L. Blondeau, Jr.

Q You are the assistant District Attorney for Bossier Parish, Louisiana?

A I am.

Q You were the assistant district attorney responsible for the prosecution of the case of State of Louisiana versus, versus Richard Trest?

A I was.

Q In connection with the preparation of that case for trial, Mr. Blondeau, is it not a fact that you told myself and Mr. Trest that if the defendant elected to go to trial that he would be prosecuted as a multiple offender?

A In the event that he as convicted. Yes. I also told you that if he did not--That if he entered a guilty plea, that I would not prosecute him as a multiple offender.

Q That if he entered a guilty plea, he would not be prosecuted as a multiple offender, but that if he elected to be tried by a jury, you would prosecute him as a multiple offender?

A That if he made the state go through the necessity

of proving his guilt by a jury trial that, that I would file a multiple offender bill and I did in fact file the multiple offender bill. That's what we're here for today.

Q But if the defendant had not elected to be tried by a jury, you would not have filed a multiple bill?

A If he had pled guilty, I would not have filed a multiple offender bill. I did--That was not That was my offer to you in exchange for a guilty plea.

Q Okay if he had pled guilty, you would not file a multiple offender bill, but if he elected to exercise his right to trial, that you would file a multiple offender bill. Is that correct?

A If he was convicted and went to trial, I said I would file a multiple offender bill and I have honored my promise to you.

Q I have no further evidence.

THE COURT: You have made your record. Do you have any argument?

MR. BLONDEAU: I have no evidence Your Honor.

MR. PHILLIPS: Other than to state your Honor that the, the threat by the state of prosecuting a defendant as a multiple offender solely as punishment for his exercising his constitutional right to trial by a jury, is an unconstitutional exercise of power by the office of the District Attorney and the multiple offender bill of information utilized for that purpose should be quashed and not allowed to stand.

MR. BLONDEAU: Your Honor, first of all

I'd like to say to you--Your Honor's attention the case of Warden Kurper versus Hays. That's a United States Supreme Court case 98 Supreme Court 663, 1970 case in which an identical issue was raised in a Kentucky case in which the, the Kentucky prosecutor under their statute they could file a habitual offender bill even before the trial. Of course, in the Louisiana case, I can't even file habitual offender bill until after the man has been convicted. But in that case, the United States Supreme Court clearly addressed the issue and held that this was a legitimate plea bargain technique by the State, and in fact they, they commanded the prosecutor for being straight forward about what he would do. And specifically held that it was constitutional. There's also been I believe several state cases which have addressed that issue. Louisiana Supreme Court cases. I don't have the citations available, but they have also indicated that it's a legitimate exercise of the prosecutor's role to engage in plea bargain techniques such as this. I have a copy of that case if you'd like to.

THE COURT: I have a--I don't need to see that. I haven't seen that particular case, but I have reviewed some of the cases prior to today dealing with this multiple offender proposition only. The same plea bargain technique used by the District Attorney has been used previously in this state and the court has stated that that was a function that they could do. I mean they have a right to file a bill or not file a bill and just as they have a

right to enter in plea bargains and negotiated pleas and reduce the offenses, so the motion to quash is denied.

MR. BLONDEAU: Any further motions Mr. Phillips. Are you ready to proceed?

MR. PHILLIPS: No further motions.

MR. BLONDEAU: May I proceed Your Honor?

THE COURT: You may proceed. Now for the record has -- Does the defendant desire -- Has the defendant been arraigned on a multiple offender bill?

MR. BLONDEAU: Yes he was Your Honor. On April 24, 1979, and pled not guilty and that he was not--I guess that he was not the guy. I don't know what the correct...

THE COURT: Alright then you may proceed.

MR. BLONDEAU: Your Honor, you have the bill of information in this matter? I need the bill of information...(inaudible)...Your Honor, I'd like to at this time mark the original bill of information in this matter as state exhibit 1 for identification and offer and introduce that bill of information into evidence.

THE COURT: Mr. Phillips. Any objection.

MR. PHILLIPS: I don't have an interjection to interpose at this time.

THE COURT: Let the offering be received in evidence.

MR. BLONDEAU: I'd also like to

introduce into evidence a document I've marked as State Exhibit 2 en globo. Certified conviction record of the defendant. Mr. Phillips has seen a copy of this previously.

MR. PHILLIPS: We would object to the introduction of the, of the cover letter or any of the other documents which are not properly marked to show that they are certified by this attached form certificate. The--There seems to be a lot of documents stapled together here, but I don't know which goes with which, who prepared them or who put them in that position. There are Xerox copies bearing no certification under the form, ...(inaudible).. certificate from the director of records. I would object to the introduction of any of these documents until it's properly shown that these are the documents that were in fact certified.

THE COURT: ..(INAUDIBLE)... I think the objection really is only to the cover letter, and I think we can eliminate the cover letter. I mean I don't think it has no bearing.

MR. PHILLIPS: My objection is to the cover letter, the photograph and the finger prints. All of those documents which are stapled prior to the certification document itself.

THE COURT: Let the objection be noted. Let the offering be received into evidence.

MR. BLONDEAU: With the exception of the cover letter Your Honor?

THE COURT: With the exception of the cover letter.

MR. BLONDEAU: Let me remark that.

MR. PHILLIPS: May it please the court. Request that the court note my objection is to those document which are stapled in front of the certification. And which are not properly identified to belong to the certification any more than the cover letter is identified as belonging to the certification.

THE COURT: Alright, let the objection be noted.

MR. BLONDEAU: I'd like to point out Your Honor for the record that the, that the card that he refers to does contain a name of Richard Frank Trest and that the picture contains his name and a picture of the individual and ask that the court take judicial notice of the, of the--insofar as the admissibility --identification of these records with the remainder of the record, if the court do that. Also I'd like to offer and introduce the documents I've marked as State Exhibit 3 for identification which is an excerpt of the transcript from the testimony of the defendant at the trial on the merits, certified by Kay Rachal as the court reporter as being a true and correct trans--excerpt of the court ..(inaudible)...testimony.

THE COURT: Got any objection to that offering Mr. Phillips.

MR. PHILLIPS: (no answer heard.)

THE COURT: Let the offerings identified be received into evidence.

MR. BLONDEAU: At this time call Mr. Ron Thiebaud to the stand please.

RON THIEBAUD

Called as a witness by counsel for the State, after having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. BLONDEAU:

Q State your name and address for the court please.

A Ron Thiebaud, 215 Chimney Lane, Haughton, Louisiana.

Q And where are you employed Mr. Thiebaud?

A Bossier Parish Sheriff's Department.

Q In what capacity?

A Deputy Sheriff.

Q And how long have you been--been so employed there?

A Three years.

Q Would you describe for the court briefly the nature of your duties as a deputy here in Bossier Parish?

A I'm assigned to the identifications division of our department. My duties are to assist in crime scene investigations to help preserve and collect evidence from those crime scene to properly photograph and preserve the evidence that has been collected. My general duties as far as office procedures are concerned, I am responsible for the finger printing and photographing of those individuals who are incarcerated in Bossier Parish jail and I am custodian of those finger prints and it's my job to classify and properly file the cards once they are classified.

Q Okay is every--Is every individual who is booked into the jail finger printed?

A That's correct.

Q And is everyone of these classified and filed by you?

A Yes they are.

Q Approximately how many finger prints have you classified in the past three years that you've been with the department?

A I'd say several thousand in the last three years.

Q Okay. Now you stated you are the records custodian of Bossier Parish?

A That's correct.

Q I'm going to show you at this time a document which I've marked as State Exhibit 4 for identification, which purports to be a, a booking card on Richard Franklin Trest and ask you if you can identify that, that document?

A Yes sir. This is one of our cards that has identification markings on the top of the card and also has my signature attached to it, wherein I classified this card as a record for our department.

Q And does it indicate to whom that card belongs?

A Richard Franklin Trest.

Q Alright now you stated that these cards were taken on every individual that enters the jail and booked into the jail, is that correct?

A Every felony conviction or impersonators charged with felony charge. It's of course, printed on one of those cards?

Q And is that part of your standard procedure?

A That is our standard procedure. Yes sir.

Q And these are kept in your ordinary course of business is that correct?

A That's correct.

Q And you are the custodian of this record?
A Yes sir.

MR. BLONDEAU: Your Honor, at this time, I'd like to offer and introduce into evidence, State Exhibit 4 for identification. It's state exhibit 4.

THE COURT: Any objection Mr. Pat.

MR. PHILLIPS: I have no objection.

THE COURT: Let the offering identified as State Exhibit 4 be received in evidence.

Q Mr. Thiebaud, could you now describe to the court your, your general educational background please.
A I'm a graduate of North Caddo High School in Caddo Parish. I attended Northwestern State University. I have 145 hours towards a bachelor's degree in education. I have attended a personnel management school which is sponsored by the President Association of National Retail Merchant's Association. I have nine semester hours in Bossier Community College and Criminology.
Q Okay.
A The basis of my education.
Q Now would you describe for the court also your training as an identification officer and/or finger print examiner?
A A graduate of the Northwest Regional Police Academy. I have attended several special schools which are are pilot courses from the Northeast Louisiana University that were held at the Northwest Criminalistic Laboratory in Shreveport. There is-- One of those schools is a basic finger print

technology school, which I'm a graduate of. An advance finger print technology school.
Q Did you graduate from that one also?
A Yes I did, and the evidence technician school that is offered by Northeast Louisiana School.
Q Did you graduate--Did you also graduate from there?
A Yes. I graduated from all three of those.
Q Did you receive certificates from each one of these?
A Yes I have.
Q Have you attended any other seminars or anything else in the ..(inaudible)..
A Yes sir, I've attended several different seminars concerning the crime scene investigations and homicide investigations. I have also received training--eight weeks training in Sheveport Police Department, I. D. Division as a trainee in latent finger print comparisons.
Q Did you complete that course also?
A Yes I did.
Q Of that training. Let me ask you this. Have you completed all standard training for finger print examiners?
A Yes sir I have.
Q Okay. And you have been examining finger prints you say for the last three years. Is that correct?
A I have.

MR. BLONDEAU: Your Honor, at this time I'd like to tender Deputy Thiebaud's as expert in the field of finger print identification.

CROSS EXAMINATION

BY MR. PHILLIPS:

Q Mr. Thiebaud, do you consider yourself to be an expert in identifying finger prints?

A I consider myself qualified to examine finger prints, yes sir.

Q My question was do you consider yourself to be an expert in that field?

A I have not been accepted by the court as an expert. You want my personal opinion?

Q Yes sir.

A Yes sir.

Q Have you been accepted by this court before as a finger print expert?

A No sir, I have not.

Q Have you been accepted by any court as a finger print expert?

A No sir I have not.

Q Have you ever compared finger prints and testified in court that they are identical?

A I have compared prints. I have not had to testify on the comparisons.

Q You never had occasion to testify concerning finger prints?

A That's correct.

Q I believe you testified that you classified finger prints?

A That's correct.

Q What does that mean?

A The classification of a print is done through a formulated system known as the Henry system, which

has been in our country since the early 1900's. It is the basis of that formula which we file finger prints. They're not filed by alphabetical listing or the numerical listing, but by the formula itself, derived from the characteristics of the patterns.

Q How many different characteristics do you have?

A There are three general groupings of finger prints. When these general groupings are taken, the only thing we concern ourself with in classification is the finger tips of the fingers themselves. These general groupings are found on the finger tips, the general groupings being described or called loops, whirls and arches. They can be subdivided into subgroups.

Q Do you--In connection with your work with the Sheriff's Department, do you subdivide those subgroups?

A Yes you do.

Q In all cases?

A All cases.

Q How many subdivisions are there in each of the three major groups?

A The three major groups in the loops category, there are two subdivisions, there are three, three subdivisions in the four--four subdivisions in the whirls and two subdivisions in the arches.

Q Are there any other subgroups?

A The groupings can be broken out further. We do not break them out further in our department because the volume of our finger prints that we take in at the Bossier Parish Sheriff's Department do not

necessitate going to any other great lengths in these ..(inaudible)..out of the groupings.

Q So as I understand what you're saying, there are three major groups of finger prints, the loops, the swirls and the arches. And under those three there are two different types of loops, four different types of swirls and two different types of arches?

A That's correct.

Q Which gives you a total of eight categories?

A That's correct.

Q And your job has been to place these finger prints in the proper file under each of those eight categories?

A Based on the formula that is used.

Q Based on what kind of formula?

A On the Henry system formula.

Q What is that formula?

A The formula is consists of a different amount of numerical figures and letterings that are derived from the patterns of the finger prints themselves.

Q How do you derive these numerical figures?

A By the rules that are set forth in the formula.

Q Is it a complicated formula?

A Yes it's complicated.

Q But basically your, your association with finger print data and finger prints has been to separate them into these eight basic groups?

A That's only one area that I concern with the finger print.

Q What are the other areas?

A In the field of crime scene technology as far as the

latent or invisible prints that can be processed and found at crime scenes in comparison to these finger prints that we're talking about classified and filed. But you've never had an opportunity to be qualified as an expert or to testify in court that certain finger prints matched?

A That's correct.

MR. PHILLIPS: I have no further questions concerning Mr. Thiebaud's qualifications. I do not agree that his training and experience in classifying finger prints or in lifting latent prints from a crime scene would qualify him as an expert to make comparisons of different sets of prints taken by different persons and testified that they are or are not the same. He's not shown that he's had sufficient experience in that area, other than the taking of finger prints, the lifting of finger prints, and the classification of finger prints.

RE-DIRECT EXAMINATION

BY MR. BLONDEAU:

Q Let me ask you this Deputy Thiebaud. You have had occasion to actually compare finger prints, have you not?

A Yes sir, I have.

Q Knowns with unknowns or knowns with...Is that correct?

A That's correct.

Q And have you actually done that in, in active criminal cases?

A Yes sir I have.

Q And what was the rea--And you said you did not testify in this case, what was the reason that you didn't testify in this case?

A Convictions were brought about either by a plea to a lesser sentence or by a guilty plea.

Q And I believe you did state on the record that you have completed all of the schooling since three years ago, two years ago I believe you said that is necessary for qualification as a finger print examiner. Is that correct?

A That's correct.

Q That's all I have Your Honor.

THE COURT: Deputy Thiebaud, will you.. oh you want to...

RE-CROSS EXAMINATION

BY MR. PHILLIPS:

Q Let me ask one other question. You said you completed all the schooling necessary for the qualification as a finger print examiner. You telling me there's no other school that you can go to?

A No sir, that is the standard schools they are offered as a finger print examiner. There are schools that come abreast every day which I do attend periodically throughout the year. Anytime there are new techniques that come about we do, we do attend these of course to stay abreast of what we need to know.

Q Excuse me. When was your last school attendance?

A My last school attendance?

Q Yes sir.

A In conjunction with finger prints?

Q Yes sir.

A Would have been the latter part of last year, November I believe we completed the last course in advance finger print technology.

Q Okay did that deal with lifting finger prints?

A That dealt with all-- with all phases of it, classification, the latent examinations and the comparisons of the two. It was an advance course in latent finger print examinations.

Q Have you received any type of certificate that you are a certified finger print examiner?

A There is no such certificate.

Q Excuse me, I had understood when you answer...

A There is a certificate for the completion of the

course.

Q .....(inaudible)... goes through the course.

A I do have--I do have a certificate that says I did--I am a graduate of the advance finger print school. Yes sir.

Q Is everyone who goes through the course that you're talking about an expert in examining and comparing finger prints?

A I can only speak for myself Mr. Phillips.

Q Do you consider that going through the course is sufficient to make whoever completes that course an expert?

A I would say yes.

Q All you got to do is go to school and you become an expert?

A That--That again would depend on the individual and depend on whether or not he would be accepted by a judicial court as an expert.

Q Correct me if I'm wrong, but I believe that a moment ago when you were answering Mr. Blondeau's questions, you said that you have completed all of the courses necessary to be a certified finger print examiner or something to that effect. Do you recall that testimony?

A I have completed the standard courses that are available that anyone training in this field would --I wouldn't say necessarily would be responsible to take part of, but for him to be sufficient and qualified in his field, he would need these courses.

Q By referring to them as standard courses, who, who has made the determination that they, that these

courses are standard courses?

A I--I do not know that. This is just the acceptance as far as our part of the state or the State of Louisiana is concerned, who has certified--as far as I know, they're not certified courses. I'm sure there are other college and universities throughout the state that offer the same type programs that we have here in our area.

Q Okay you say that's what's accepted in this part of the state, accepted by whom Mr. Thiebaud?

A I don't believe I understand your line of questioning there.

Q You said those are the courses that are accepted in this part of the state. And what did you mean by that?

A The agencies in our area usually participate and take part. Their identification people take part in these courses that are offered.

Q That's not to say is it Mr. Thiebaud that there is some higher authority which specifies that these are the necessary courses to take in order to qualify one to become a finger print expert?

A I'm not aware of any high authority. As I said I do not know of a certification certificate that can be given to an individual....

Q So what you're saying is that's...

A ...to say he is an expert.

Q That's all that's available in the area.

A That's correct.

MR. PHILLIPS: I have no further questions.

THE COURT: Deputy Thiebaud, you said that you had never qualified before in court as an expert. Have you ever been refused to be recognized as an expert in court before?

MR. THIEBAUD: No sir, I have not.

THE COURT: There's always a first time that an expert has to be qualified to testify in court. The court will accept Deputy Thiebaud as an expert in the field tendered. And at this time we'll take a ten minute recess.

MR. PHILLIPS: For the record at this time, I will object to the court's ruling recognizing Deputy Thiebaud as an expert and request that my objection be noted for the record.

THE COURT: Let the objection of Mr. Phillips' of the court's acceptance of Mr. Thiebaud as an expert be noted.

(COURT RECESS)

THE COURT: The defendant's returned to the courtroom Mr. Sheriff we'll have order.

MR. SHERIFF: Let's have order.

THE COURT: You may proceed Mr. Blondeau.

MR. BLONDEAU: Thank you Your Honor.

RE-DIRECT EXAMINATION

BY MR. BLONDEAU:

Q Mr. Thiebaud, I'm going to hand you a document which has previously been introduced into evidence as State Exhibit 1, which is the copy of the bill of information in which the defendant finger prints were affixed in accordance with, with law upon his conviction. And also hand you state exhibit 2 for identification which is ..inaudible)... on these two documents.

A Yes sir I have seen both of these documents and I have compared the prints on the documents.

Q Okay, and what was your determination when you prepared those two sets of documents?

A They are one in the same. The prints on the bill of information and the prints there on the certified copy are the same prints.

Q I now hand you exhibit 4 for identification which you previously identified as the arrest record or booking card for Richard Franklin Trest. Is that correct?

A Yes sir.

Q Have you had occasion to compare that card with both the finger prints on the bill of information and the Mississippi conviction record finger prints?

A Yes sir I have.

Q And have you made a determination as to whether or not those prints match?

A Yes sir, they're all three the same prints.

Q And is it your opinion that all of these finger prints were made by the same individual?

A Without doubt. Yes sir.

MR. BLONDEAU: I tender Your Honor.

MR. PHILLIPS: I have no questions.

THE COURT: Thank you Mr. Thiebaud.

MR. BLONDEAU: That's all the evidence the state has.

THE COURT: Mr. Phillips?

MR. PHILLIPS: The defense has nothing.

THE COURT: Of course the court can take judicial notice of what goes on in its own courtroom. Mr. Trest at the trial of this case which I presided over took the stand and testified and freely admitted to having committed these offenses. The additional evidence that we have into the record is really a corroboration of the fact that he has admitted from this stand. So I find that he is a multiple offender. However, these particular offenses that were charged were charged under one information. Five charges were the sentences all received on the same day?

MR. BLONDEAU: They were Your Honor.

THE COURT: Which the court shall consider one offense. Therefore this defendant will be a second offender in the opinion of the court under the statute and I think under the ruling of the cases as I appreciate them State versus Shamburg, 344 So. Reporter Second, at page 1002, which is a 1977 case, wherein the court also refers to State ex rel Jackson versus Henderson, 283 So.2d, 210 1973, where the court held that four previous

convictions entered on the same day, should be treated as one for applying the multiple offender statute. This is contrary to some previous cases, but that's the law as I appreciate it.

MR. BLONDEAU: The state agrees with Your Honor's appreciation of the law.

THE COURT: Now we come to the matter of the remand for sentence. You are Richard Franklin Trest?

MR. TREST: Yes I am.

THE COURT: Mr. Trest, you are represented -- were represented at your trial with a charge of armed robbery under 56,394 by Mr. Pat Phillips of the Indigent Defender Board. Is that correct?

MR. TREST: As far as Pat Phillips. Yes.

THE COURT: And a jury has found you guilty, and I have ordered a pre-sentence report to be made and received that report. Subsequent to that, the district attorney has filed the multiple offender bill which we have just had a hearing on and you are remanded--were remanded this date for sentence. Are you ready for your sentence. Are you ready for your sentence sir?

MR. TREST: Yes I am.

THE COURT: Mr. Trest, how old are you sir?

MR. TREST: I'm 21.

THE COURT: The crime of armed robbery carries a minimum sentence of five years at hard labor,

with a maximum sentence of ninety-nine years. This sentence is without the benefit of probation, parole and suspension. You have been found to be a multiple offender. Therefore, the minimum sentence that you may receive in this court is a sentence of one-third of the maximum that you could receive as a first offender. That is the minimum sentence that I can give you is thirty-three years. The maximum sentence under the statute which you have just been convicted as a multiple offender is twice the maximum of the original or 198 years. My discretion therefore, is sentencing guidelines as provide by the law is remedied within those brackets. The --You're a young man. And the court has found that your offenses took place that put you in Mississippi all on the same time. Because of your age, it is the sentence of this court that you be committed to Louisiana Department of Corrections for incarceration at hard labor, without the benefit of parole and probation, and suspension of sentence, for a period of thirty-five years. Do you understand your sentence?

MR. TREST: Yes I do.

THE COURT: Do you understand that you have a right to appeal your sentence in all these proceedings that have been had against you?

MR. TREST: Yes I do.

THE COURT: Alright.

CERTIFICATE

I, CAROL ST. GERMAIN, hereby certify that the foregoing typewritten pages constitute a true and correct transcript of my audiograph recording of the evidence that was taken on the trial of the foregoing entitled and numbered cause on the date and at the place set forth on page one hereof.

DATED: AUGUST 18, 1989

Carol St. Germain

CAROL ST. GERMAIN
COURT REPORTER

EXHIBIT B

CHAPTER 3. HABITUAL OFFENDER LAW

Sec.

529.1. Sentences for second and subsequent offenses; certificate of warden or clerk of court in the state of Louisiana as evidence.

R.S. 15:529.1, now, under this Chapter heading, was, as the section existed before 1966, under the heading of former Part XXVII of former Chapter 1. Former Part XXVII was redesignated as this Chapter 3 by Acts 1966, No. 311, § 3, and on authority of R.S. 24:253, effective January 1, 1967.

The section number and section were not changed. Former R.S. 15:555, in former Part XXVIII of former Chap. 1, was transferred to the new Chapter 1, Code of Criminal Procedure Ancillaries, and redesignated as R.S. 15:291, on authority of R.S. 24:253, effective January 1, 1967.

The designation of former Part XXVIII was deleted by Acts 1966, No. 311, § 3, and on authority of R.S. 24:253.

R.S. 15:521 to 15:529, R.S. 15:529.2 to 15:554, and R.S. 15:556 to 15:564 were repealed by Acts 1960, No. 360, § 3; Acts 1964, No. 516, § 1; Acts 1966, No. 310, § 5, eff. Jan. 1, 1967; Acts 1966, No. 311, § 1, eff. Jan. 1, 1967. For disposition of the subject matter of the repealed sections, see Concordance Table at the head of this Volume.

§ 529.1. Sentences for second and subsequent offenses; certificate of warden or clerk of court in the state of Louisiana as evidence

A. Any person who, after having been convicted within this state of a felony, or who, after having been convicted under the laws of any other state or of the United States, or any foreign government or country of a crime which, if committed in this state would be a felony, thereafter commits any subsequent felony within this state, upon conviction of said felony, shall be punished as follows:

(1) If the second felony is such that upon a first conviction the offender would be punishable by imprisonment for any term less than his natural life, then the sentence to imprisonment shall be for a determinate term not less than one-third the longest term and not more than twice the longest term prescribed for a first conviction;

(2) If the third felony is such that upon a first conviction, the offender would be punishable by imprisonment for any term less than his natural life then,

(a) The person shall be sentenced to imprisonment for any term not less than one-half the longest possible sentence for the conviction and not more than twice the longest possible sentence prescribed for a first conviction; or

(b) If the third felony and each of the two prior felonies involved a violation of R.S. 14:34, R.S. 14:62.1, R.S. 14:65, R.S. 14:110(B), or of any crime punishable by imprisonment for more than twelve years, the person shall be imprisoned for the remainder of his natural life, without benefit of parole, probation, or suspension of sentence.

(3) If the fourth or subsequent felony is such that, upon a first conviction the offender would be punishable by imprisonment for any term less than his natural life then,

(a) The person shall be sentenced to imprisonment for the fourth or subsequent felony for a determinate term not less than the longest prescribed for a first conviction but in no event less than twenty years and not more than his natural life; or

(b) If the fourth or subsequent felony and two of the prior felonies involved a violation of R.S. 14:34, R.S. 14:62.1, R.S. 14:65, R.S. 14:110(B), or of any crime punishable by imprisonment for more than twelve years, the person shall be imprisoned for the remainder of his natural life, without benefit of parole, probation, or suspension of sentence.

B. It is hereby declared to be the intent of this Section that an offender need not have been adjudged to be a second offender in a previous prosecution in order to be charged as, and adjudged to be, a third offender, or that an offender have been adjudged in a prior prosecution to be a third offender in order to be convicted as a fourth offender in a prosecution for a subsequent crime. Provided, however, that the offender shall be deemed a second offender only if the crime resulting in the second conviction shall have been committed after his first conviction; that one shall be deemed a third offender under this Section only if the crime resulting in the third conviction shall have been committed after his conviction for a crime which in fact caused him to be a second offender, whether or not he was adjudged to be a second offender in the prior instance; and that one shall be deemed to be a fourth offender under this Section only if the crime resulting in the fourth conviction shall have been committed after his conviction for a crime which in fact caused him to be a third offender, whether or not he was adjudged to be a third offender in the prior instance.

C. This Section shall not be applicable in cases where more than five years have elapsed since the expiration of the maximum

sentence, or sentences, of the previous conviction, or convictions, and the time of the commission of the last felony for which he has been convicted. In computing the period of time as provided herein, any period of servitude by a person in a penal institution, within or without the state, shall not be included in the computation of any of said five year periods.

D. If, at any time, either after conviction or sentence, it shall appear that a person convicted of a felony has previously been convicted of a felony under the laws of this state, or has been convicted under the laws of any other state or of the United States; or any foreign government or country of a crime, which, if committed in this state would be a felony, the district attorney of the parish in which subsequent conviction was had may file an information accusing the person of a previous conviction. Whereupon the court in which the subsequent conviction was had shall cause the person, whether confined in prison or otherwise, to be brought before it and shall inform him of the allegation contained in the information and of his right to be tried as to the truth thereof according to law and shall require the offender to say whether the allegations are true. If he denies the allegation of the information or refuses to answer or remains silent, his plea or the fact of his silence shall be entered on the record and the judge shall fix a day to inquire whether the offender has been convicted of a prior felony or felonies, as set forth in the information. If the judge finds that he has been convicted of a prior felony or felonies, or if he acknowledges or confesses in open court, after being duly cautioned as to his rights, that he has been so convicted, the court shall sentence him to the punishment prescribed in this Section, and shall vacate the previous sentence if already imposed, deducting from the new sentence the time actually served under the sentence so vacated.

E. Whenever it shall become known to any superintendent or prison, probation, parole, police, or other peace officer, that any person charged with or convicted of a felony has been previously convicted within the meaning of this Section, he shall immediately report the fact to the district attorney of the parish in which the charge lies, or the conviction has been had.

F. The certificates of the warden or other chief officer of any state prison, or of the superintendent or other chief officer of any penitentiary of this state or any other state of the United States, or of any foreign country, or of any chief officer of any parish or county jail in this state or any other state of the United States, or of the clerk of court of the place of conviction in the state of Louisiana, under the seal of his office, if he has a seal, containing the name of the person imprisoned, the photograph, and the fingerprints of the per-

son as they appear in the records of his office, a statement of the court in which a conviction was had, the date and time of sentence, length of time imprisoned, and date of discharge from prison or penitentiary, shall be prima facie evidence of the imprisonment and of the discharge of the person, either by a pardon or expiration of his sentence as the case may be under the conviction stated and set forth in the certificate.

Acts 1956, No. 312, §§ 1 to 4. Amended by Acts 1958, No. 469, § 1; Acts 1978, No. 424, § 1; Acts 1979, No. 199, § 1.

History and Source of Law

Acts 1956, No. 312, § 5, repealed R.S. 1950, 15:529.1 and §§ 1 to 4 enacted parallel provisions which were set out under the same section number.

The 1958 amendment added the last three sentences to subsection D.

The 1978 amendment rewrote paragraphs (2) and (3) of subsection A, which had provided:

"(2) If the third felony is such that, upon a first conviction, the offender would be punishable by imprisonment for any term less than his natural life, then the person shall be sentenced to imprisonment for any term not less than one-half the longest term and not more than twice the longest term prescribed for a first conviction;

"(3) If the fourth or subsequent felony is such that, upon a first conviction, the offender would be punishable by imprisonment for any term less than his natural life, then the person shall be sentenced to imprisonment for the fourth subsequent felony for a determinate term not less than the longest term prescribed for a first conviction and not more than his natural life and in no case less than twenty years."

The 1979 amendment added "or clerk of court in the state of Louisiana" to the section heading and, in subsection F, added "or of any chief officer of any parish or county jail in this state or any other state of the United States, or of the clerk of court of the place of conviction in the state of Louisiana," and deleted, following "prima facie evidence", "on the trial of any person for a second and subsequent offense".

Prior Laws:

Acts 1855, No. 120, § 118.
R.S.1856, p. 155 (§ 119).
R.S.1870, § 974.
Acts 1928, No. 15, §§ 1 to 3.
Acts 1928, No. 16, § 1.
Acts 1938, No. 422, § 1.
Acts 1942, No. 45, §§ 1 to 4.

Title of Act:

An Act in relation to second and subsequent offenders convicted of felony violations, their sentence and resentence and prescribing the penalties and specifically repealing LSA–R.S. 15:529.1, and all laws or parts of laws in conflict herewith. Acts 1956, No. 312.

Cross References

Beverage and food containers, unlawful use, second offenses, see R.S. 51:243.
Candies or sweets, violation of license requirements, second offenders, see R.S. 14:357.
Contempt, second and subsequent offenses, see R.S. 13:4611.
Controlled dangerous substances,
Probation and suspension of sentence, see LSA–C.Cr.P. art. 893.
Second or subsequent offenses, see R.S. 40:982.
Diminution of sentence for good behavior prohibited as to habitual offenders, see R.S. 15:571.3.
Dogs, theft, second and subsequent offenses, see R.S. 14:67.2.
Imprisonment in prison districts, see R.S. 15:302.
Indictment, method of alleging prior conviction, see LSA–C.Cr.P. art. 483.

EXHIBIT C

SUBPART B. BY MISAPPROPRIATION WITH VIOLENCE TO THE PERSON

§ 64. Armed robbery

A. Armed robbery is the taking of anything of value belonging to another from the person of another or that is in the immediate control of another, by use of force or intimidation, while armed with a dangerous weapon.

B. Whoever commits the crime of armed robbery shall be imprisoned at hard labor for not less than five years and for not more than ninety-nine years, without benefit of parole, probation or suspension of sentence.

Amended by Acts 1958, No. 380, § 1; Acts 1962, No. 475, § 1; Acts 1966, Ex.Sess., No. 5, § 1; Acts 1983, No. 70, § 1.

Reporter's Comment

Louisiana statutes covered:

R.S.1870, § 809 (robbery).

R.S.1870, § 810 (robbery of bills, notes or certificates).

Acts 1890, No. 14, § 1 (train robbery).

Source and scope:

As stated in Act 50 of 1805, the Louisiana Legislature has adopted the common law definition of robbery as it existed previous to that time. There does not appear to have been any change in the elements of this crime since 1805. The common-law definition is aptly stated in the California Penal Code (1933) § 211 and it is from that source that this section was adopted, with very few changes.

From the person of another:

The words "taking from the person * * * of another" as used in connection with the common law definition of robbery are not restricted in application to those cases in

which the property taken is in actual contact with the person of the one from whom it is taken, but, if the property is away from the owner, yet under his control, for instance in another room of the house, it is nevertheless in his possession, and if he is deprived thereof, it may well be said it is taken from his possession. See State v. Verret, 174 La. 1059, 142 So. 688 (1932).

"Anything of value":

The phrase "anything of value" was preferred to "property," in order to obviate the difficulties of the common-law interpretation, which holds that dogs, electricity, and gas are not property. Therefore, "anything of value" is to be applied in its broadest sense to include all things, tangible or intangible. See R.S. 14:2.

History and Source of Law

Source:

Acts 1942, No. 43, § 1, Art. 64.

Prior Laws:

Acts 1805, No. 50.

R.S.1870, §§ 809, 810.

Acts 1890, No. 14, § 1.

As originally contained in the 1950 Revised Statutes, the section read:

"Armed robbery is the theft of anything of value from the person of another or which is in the immediate control of another, by use of force or intimidation, while armed with a dangerous weapon.

"Whoever commits the crime of armed robbery shall be imprisoned at hard labor for not less than one nor more than fifteen years."

The 1958 amendment increased the penalty from imprisonment at hard labor from not less than 1 nor more than 15 years to not less than 2 nor more than 30 years.

The 1962 amendment designated the first and second paragraphs as subsecs. A and B, respectively; and rewrote subsec. B to read:

"B. Whoever commits the crime of armed robbery shall be imprisoned at hard labor for not less than five and not more than thirty years, without benefit of parole, probation or suspension of sentence, except as provided in R.S. 15:574.3(G)."

The 1966 amendment rewrote subsec. B to read as it now appears.

The 1983 amendment, in subsec. A, substituted "taking" for "theft" and inserted "belonging to another".

On authority of R.S. 24:253, "that" was substituted for "which" in subsec. A as amended in 1983.

Cross References

Aggravating circumstances in commission of crime, see C.Cr.P. art. 905.4.
"Anything of value" defined, see R.S. 14:2.
"Dangerous weapon" defined, see R.S. 14:2.
Good time allowance on sentence, eligibility, see R.S. 15:571.3.
Indictment, form, see C.Cr.P. art. 465.
Juvenile courts, jurisdiction, see R.S. 13:1570.
Murder in killing in perpetration or attempt, see R.S. 14:30.
Prescription of prosecution, see C.Cr.P. art. 571 et seq.
Responsive verdicts, see C.Cr.P. art. 814.

Law Review Commentaries

Analysis of the Criminal Code. Clarence J. Morrow, 17 Tulane L.Rev. 1, 13 (1942).

Comparison of the Criminal Code with prior criminal law. Dale E. Bennett, 5 La. L.Rev. 6, 38 (1942).

Criminal law—Work of appellate courts for 1976–1977. John S. Baker, Jr., 38 La.L. Rev. 422 (1978).

Developments in the law, 1982–1983: Criminal law. John S. Baker, Jr., 44 La.L. Rev. 279 (1983).

Enactments and amendments on criminal law and procedure passed during 1958 Legislative session. Dale E. Bennett, 19 La.L. Rev. 79 (1958).

Work of the Louisiana appellate courts for 1974–1975 term: Criminal law. Dale E. Bennett, 36 La.L.Rev. 502 (1976).

Library References

Robbery ⇐11.
C.J.S. Robbery §§ 25 to 30.

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APPEARANCE FORM / WAIVER

SUPREME COURT OF THE UNITED STATES

No. 96-7901

TREST, RICHARD F. (Petitioner) v. CAIN, WARDEN (Respondent)

I do not intend to file a response to the petition for a writ of certiorari unless one is requested by the Court.

Please check one of the following boxes:

☒ Please enter my appearance as Counsel of Record for all respondents.

☐ There are multiple respondents, and I do not represent all respondents. Please enter my appearance as Counsel of Record for the following respondent(s):

I certify that I am a member of the Bar of the Supreme Court of the United States (Please explain if your name has changed from when you were admitted).

Signature James M. Bullers

Date: March 10, 1997

(Type or print) Name JAMES M. BULLERS

☒ Mr. ☐ Ms. ☐ Mrs. ☐ Miss

Firm BOSSIER PARISH DISTRICT ATTORNEY'S OFFICE

Address P.O. BOX 69

City & State BENTON Zip 71006

Phone (318) 965-2332

A copy of this form must be sent to petitioner's counsel or to petitioner if *pro se*. Please indicate below the name(s) of the recipient(s) of a copy of this form:

CC: REBECCA L. HUDSMITH
102 VERSAILLES BLVD., STE. 816
LAFAYETTE, LA 70501

CLER-0060-9-95

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D. C. 20543

February 19, 1997

Ms. Rebecca L. Hudsmith
102 Versailles Boulevard
Suite 816
Lafayette, LA 70501

Re: Richard F. Trest,
v. Burl Cain, Warden
No. 96-7901

Dear Ms. Hudsmith:

The petition for a writ of certiorari in the above entitled case was filed January 27, 1997 and placed on the docket February 18, 1997 as No. 96-7901.

A form is enclosed for notifying opposing counsel that the case was docketed.

Sincerely,

William K. Suter, Clerk

by

Jeffrey D. Atkins
Assistant

Enclosures

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D. C. 20543

February 19, 1997

Clerk
United States Court of Appeals for
the Fifth Circuit
600 Camp Street, Room 100
New Orleans, LA 70130

Re: Richard F. Trest,
v. Burl Cain, Warden
No. 96-7901
(Your Docket No. 94-40515)

Dear Clerk:

The petition for a writ of certiorari in the above entitled case was filed January 27, 1997 and placed on the docket February 18, 1997 as No. 96-7901.

Sincerely,

William K. Suter, Clerk

by

Jeffrey D. Atkins
Assistant

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, DC 20543

WILLIAM K. SUTER
CLERK OF THE COURT

January 31, 1997

AREA CODE 202
479-3011

Rebecca L. Hudsmith
102 Versailles Boulevard
Suite 816
Lafayette, LA 70501

RE: Richard F. Trest v. John P. Whitley, Warden

Dear Ms. Hudsmith:

The above-entitled petition for writ of certiorari was postmarked January 27, 1997 and received January 31, 1997. The papers are returned for the following reason(s):

The appendix to the petition does not contain the following documents required by Rule 14.1(i):

The report and recommendation of the magistrate must be appended.

The order denying rehearing must be appended. Rule 14.1(i)(iii).

Please correct and resubmit as soon as possible. Unless the petition is received by this Office in corrected form within 60 days of the date of this letter, the petition will not be filed. Rule 14.5.

A copy of the corrected petition must be served on opposing counsel.

Sincerely,
William K. Suter, Clerk
By:

Jeffrey Atkins
(202) 479-3263

Enclosures

cc: James M. Bullers

No. 96-7901

(4)

Supreme Court, U.S.
FILED
AUG 4 1997
CLERK

In The

Supreme Court of the United States

October Term, 1996

RICHARD F. TREST,

Petitioner,

vs.

BURL CAIN, WARDEN,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

JOINT APPENDIX

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Counsel for Respondent
Burl Cain

Petition For Certiorari Filed January 27, 1997
Certiorari Granted May 27, 1997

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102 pp

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RELEVANT DOCKET ENTRIES

DATE	PROCEEDINGS
08/30/91	Motion by Richard F. Trest to proceed in forma pauperis with Proposed Order referred to Magistrate Roy S. Payne
09/06/91	Order granting in part, denying in part motion to proceed in forma pauperis; IFP granted upon payment of $5 filing fee (signed by Magistrate Roy S. Payne)
09/30/91	Filing fee paid; filing fee $5 receipt #50963. Case referred to Magistrate Roy S. Payne
09/30/91	Petition for writ of habeas corpus
12/19/91	Memorandum Order; directing Clerk to serve respondent, Atty General and Dist Atty; Answer due w/I 30 days of svc, afterwhich pltf allowed 20 days to respond; All future pleadings shall have cert of svc (signed by Magistrate Roy S. Payne)
01/9/92	Answer to Complaint by Warden La State Pen
01/24/92	Response by Richard F. Trest in opposition to answer
01/28/93	Case referred to Magistrate Judge Roy S. Payne for Report and Recommendation
02/02/94	Report and Recommendations by Magistrate Judge Roy S. Payne that habeas be denied. Objections to R and R due by 2/16/94
02/18/94	Objection by Richard F. Trest to report and recommendations

05/16/94 Judgment ordered that petitioner's application for writ of habeas corpus is denied

05/16/94 Case closed

05/26/94 Notice of Appeal by Richard F. Trest from judgment order entered 5/16/94 by Judge Tom Stagg

05/26/94 Motion by Richard F. Trest for certificate of probable cause with Proposed Order referred to Judge Tom Stagg

06/20/94 Certificate of probable cause denying motion for certificate of probable cause (signed by Judge Tom Stagg)

STATE OF LOUISIANA
EX REL, RICHARD
FRANKLIN TREST,

PETITIONER,

VERSUS

LARRY SMITH,
WARDEN, LOUISIANA
STATE PENITENTIARY,

RESPONDENT.

DATED FILED: _____

NO. 56,595

26TH JUDICIAL
DISTRICT COURT

PARISH OF BOSSIER

STATE OF LOUISIANA

BY: _____
CLERK OF COURT

MOTION TO CORRECT ILLEGAL SENTENCE
(LA. C.CR.P. ART. 882)
(ENHANCEMENT PROCEEDINGS)

(Filed Jan. 17, 1990)

PREPARED BY:

LEGAL AID OFFICE
CAMP C
LOUISIANA STATE PENITENTIARY
ANGOLA, LOUISIANA 70712

SUBMITTED BY:

/s/ Richard Franklin Trest

RICHARD FRANKLIN TREST
PETITIONER PRO SE
911171 CAMP C, TIGER 3-R-7
LOUISIANA STATE PENITENTIARY

APPENDIX "A"

Adopted October 14, 1976
Effective January 1, 1977

UNIFORM APPLICATION FOR
POST-CONVICTION RELIEF

RICHARD FRANKLIN TREST
NAME OF PETITIONER

No. 56,595
(to be filled in by the clerk)

91171
PRISON NUMBER

26th JUDICIAL DISTRICT

___ PARISH OF BOSSIER
STATE OF LOUISIANA

LSP, ANGOLA, LOUISIANA
PLACE OF CONFINEMENT

vs.

LARRY SMITH,
WARDEN,
CUSTODIAN (Warden, Superintendent, Jailor, or authorized person having custody of petitioner)

Please Serve CUSTODIAN and A.L. BLONDEAUM ASSISTANT DISTRICT ATTORNEY, 26th JUDICIAL DISTRICT, STATE OF LOUISIANA.

* * *

PETITION

1. Name and location of court which entered the judgment of conviction challenged 26th Judicial District Court, Bossier Parish, Benton, Louisiana.

2. Date of judgment of conviction June 8, 1979.

3. Length of sentence Thirty-five (35) years without benefit of parole, probation, or suspension of sentence.

4. Nature of offense involved (all counts) Multiple Offender (R.S. 15:529.1) Second Offender

5. What was your plea? (check one)

   (a) Not guilty (X)

   * * *

   (b) Name and address of the lawyer representing you at your plea (if you had no lawyer, please indicate) Patrick Phillips, Indigent Defender Program, Benton, Louisiana.

   (c) Was the lawyer appointed (X) or hired ( )? (check one)

6. Kind of trial: (check one)

   (a) Jury ( )

   (b) Judge only (X) NOTE: This was an enhancement proceeding.

7. (a) Name and address of the lawyer representing you at your trial: Same as above

   (b) Was the lawyer appointed (X) or hired ( )? (check one)

8. Did you testify at the trial? Yes ( ) No ( ) ** NOTE: "Yes" at RobberynTrial [sic] – "NO" at HFC Trial.

9. (a) Give the name and address of the lawyer who represented you at sentencing for the conviction being attacked herein. Same as above.

   (b) Was the attorney appointed (X) or hired ( )? (check one)

10. Did you appeal from the judgment of conviction? Yes ( ) No ( ) *** This is unknown to Petitioner.

* * *

12. Other than a direct appeal from the judgment of conviction and sentence, have you previously filed any application for post-conviction relief with respect to this judgment in any state or federal court. Yes ( ) No (X)

* * *

CLAIM[S]

YOU MAY ATTACH ADDITIONAL PAGES SETTING FORTH THE REQUIRED INFORMATION (BELOW) IF ADDITIONAL CLAIMS ARE ASSERTED.

Claim: THE ENTIRE MULTIPLE OFFENDER PROCEEDINGS WERE IN VIOLATION OF LSA-R.S. 15:529.1.

(a) Supporting FACTS (tell your story briefly without citing cases or law): See attached Memorandum of Law for facts, claims, and legal argument.

(b) List names and addresses of witnesses who could testify in support of your claim. If you cannot do so, explain why:
1. Trial Record.

(c) If you failed to raise this ground in the trial court prior to conviction, on appeal or in a prior application, explain why: The Multiple Offender proceedings was protested during trial. It is unknown to Petitioner if any appeal was taken on this issue.

A. Do you have in a state or federal court any petition or appeal now pending as to the Judgment challenged? Yes ( ) No (X) If "yes", name the court

B. Do you have any future sentence to serve after you complete the sentence imposed by the judgment challenged? Yes (X) No ( )

(1) If so, give name and location of court which imposed sentence to be served in the future: 20th Judicial District Court, West Feliciana Parish, St. Francisville, La.

(2) Give date and length of sentence to be served in the future: 9-4-86 – Attempted Escape – One (1) year.

(3) Have you filed, or do you contemplate filing, any petition attacking the judgment which imposed the sentence to be served in the future? Yes ( ) No (X)

WHEREFORE, petitioner prays that the Court grant petitioner relief to which he may be entitled.

/s/ Richard F. Trest
Signature of Petitioner

9 (Day/) 1 (Month) 1990. (/Year)

STATE OF LOUISIANA EX REL, RICHARD FRANKLIN TREST,	NO. 56,595
PETITIONER,	26TH JUDICIAL DISTRICT COURT
VERSUS	
LARRY SMITH, WARDEN, LOUISIANA STATE PENITENTIARY,	PARISH OF BOSSIER
RESPONDENT.	STATE OF LOUISIANA

MEMORANDUM OF LAW

1.

STATEMENT OF JURISDICTION

This application is a Motion To Correct An Illegal Sentence challenged herein, and for the reasons appearing, infra, filed herein pursuant to the authority of La. C. Cr. P. Article 882 which states that "an illegal sentence may be corrected at any time by the court that imposed the sentence", and La. C. Cr. P. Article 930.3, which enables a defendant who has been sentenced in violation of the Constitution of the United States and of the State of Louisiana to have a sentence set aside in a Post-Conviction Relief Application.

2.

STATEMENT OF THE CASE

Petitioner, RICHARD FRANKLIN TREST, was charged by Bill of Information for Armed Robbery, a violation of LSA-R.S. 14:64. After a trial by 12 man jury

with Court-Appointed Counsel, Mr. Patrick Phillips, Petitioner was convicted as charged on March 29, 1979. The State then filed a Multiple Offender Bill of Information under the provisions of LSA-R.S. 15:529.1 charging Petitioner as a Second Offender. See Exhibit "A" attached hereto. Petitioner was subsequently convicted and sentenced to an enhancement term of thirty-five (35) years without benefit of *parole*, probation, or suspension of sentence by the Honorable Cecil C. Lowe, Judge, on June 8, 1979. See Exhibit "B" attached hereto[1].

Petitioner now attacks the entire Multiple Offender proceedings as being contrary to R.S. 15:529.1 in this litigation.

STATEMENT OF THE CLAIMS

1. The Trial Court erred by not quashing the Multiple Offender Bill of Information as being vindictive by the prosecutor.

2. The Trial Court failed to inform Petitioner of the right to be tried as to the truth of the Multiple Offender Bill of Information and as to a "formal hearing".

3. The Trial Court failed to inform Petitioner of the requirement to say whether the allegations within the Multiple Offender charge were true.

4. The Trial Court erred by allowing Defense Counsel to enter the not guilty plea to said charge.

---

[1] See Multiple Offender Transcript attached hereto and referred to as "Tr. ___" from this point onward.

5. The Trial Court failed to advise Petitioner of the right to "remain silent" and not to incriminate himself as to prior felony convictions.

6. There was insufficient evidence produced during Multiple Offender trial to show whether or not the prior felony conviction ended in a pardon.

7. The evidence introduced by the State as to prior felony convictions was illegally entered into evidence.

8. The Trial Court erred by ordering said Second Offender sentence to be without parole.

9. The Trial Court erred by not indicating the factors it had considered for imposing the sentencing in the record as required by LSA-C.Cr.P. Article 894.1.

ARGUMENT

Because the Multiple Offender issues involved in this petition are interrelated they will not be bifurcated herein and will be argued collectively.

The Multiple Offender Statute, LSA-R.S. 15:529.1(D), states in pertinent part:

> ". . . . Whereupon the court in which the subsequent conviction was had *shall* cause the person, whether confined in prison or otherwise, to be brought before it and *shall* inform him of the allegations contained in the information and of his right to be tried to the truth thereof according to law and *shall* require the offender to say whether the allegations are true."

1. The Trial Court erred by not quashing the Multiple Offender Bill of Information as being vindictive by

the prosecutor. At Tr. 5-6 the prosecutor, Mr. Alexander L. Blondeau, Jr., testified that he had threaten to Multibill Petitioner if he did not plead guilty to the Armed Robbery charge and stated at Tr. 6:

> "A. If he was convicted and went to trial, I said I would file a Multiple Offender Bill and I have honored my promise to you."

The only issue raised by the Defense before the jury was whether Petitioner committed Armed Robbery or Simple Robbery. There was no doubt of guilt in the case – just the grade of guilt and the grade of crime was the core of the trial. Petitioner was willing to plead guilty to Simple Robbery, but the prosecutor refused to accept the plea and wanted a guilty plea to Armed Robbery with no plea bargain.

Petitioner relied on *Hayes v. Cowan*, 547 F. 2d 42 (5th Cir. 1976), which provides in pertinent part:

> "Prosecutor may not charge habitual offender act against prisoner for refusing to plead guilty to lesser offense and demanding trial."

Accordingly, the Trial Court erred in not quashing the Multiple Offender Bill of Information as being vindictive.

2. The Trial Court failed to inform Petitioner of the right to be tried as to the truth of the Multiple Offender allegations. In *State v. Johnson*, 432 So. 2d 815 (La. 1983), the multiple offender record must show that the offender was told by the Trial Judge of the right to a formal hearing or else cause reversable [sic] error as the Louisiana Supreme Court held:

> " . . . R.S. 15:529.1(D) specifically provides the *defendant be advised by the court* to a 'formal hearing' and to have the State prove its case."

In *State v. Griffin*, App 1 Cir. 1988, 525 So. 2d 705, the Court of Appeals held that it would be a reversable [sic] error to not inform the defendant of *"his right to be tried as to the truth of the allegations."* Also see *State v. Easton*, App. 2 Cir. 1985, 463 So. 2d 783.

3. The Trial Court failed to inform Petitioner of the requirement to say whether the allegations within the Multiple Offender charge were true. Failure of Trial Judge to inform Petitioner of this requirement is reversable [sic] error as *State v. Easton*, App. 2 Cir. 1985, 463 So. 2d 783, held that:

> "Failure of trial court in prosecution for purse snatching and second-degree battery to inform defendant of nature of allegations in habitual offender bill of information or of his right to be tried as to the truth thereof, and *failure to require defendant to say whether the allegations were true.* . . . constitued [sic] error patent on the record, *requiring that sentence be vacated and cause remanded for further sentencing proceedings."*

At no time did the Trial Judge ask Petitioner if the allegations within the Multiple Offender Bill were true – the Judge obly [sic] asked for him to enter a plea to the Bill of Information, inwhich [sic] Defense Counsel entered a not guilty plea.

4. The Trial Judge erred by allowing Defense Counsel, Mr. Patrick Phillips, to enter the not guilty plea, rather than requiring Petitioner to enter the plea to the Multiple Offender proceedings, because Section "D" of

R.S. 15:529.1 provides that the court " . . . *shall require the offender to say whether the allegations are true.*". *State v. Easton*, App. 2 Cir. 1985, 463 So. 2d 783. Further, La. C. Cr. P. Article 553 requires that felony charged defendants "shall plead in person". Article 554 provides that "A defendant shall plea when arraigned". No where in the Code does it provide for a lawyer to enter a plea in multiple offender proceedings on behalf of the defendant. At no time did this Petitioner enter the plea, or waive his right to make the plea, or approve of the not guilty plea, or instruct Defense Counsel to enter such a plea.

5. The Trial Court failed to advise Petitioner of the right to "remain silent" and not to incriminate himself as to prior felony convictions. During the course of the Armed Robbery trial, Petitioner took the witnesses stand and testified that he committed a crime, but it was Simple Robbery – not Armed Robbery. Before, during, and while on the stand before the jury, the prosecutor, Defense Counsel, and Trial Judge *KNEW* that if he was convicted by jury for Simple or Armed Robbery that the prosecutor was going to Multibill Petitioner. During Petitioner's testimony it was extracted from Petitioner that he had been felony convicted in Mississippi and the Trial Judge used this admission of prior guilt, during the Multiple Offender Trial, to adjudicate guilt as to the Multiple Offender Bill of Information by holding at Tr. 25:

> "THE COURT: Of course the Court can take judicial notice of what goes on in its own courtroom. *Mr. Trest at the trial of this case which I presided over took the stand and testified and freely admitted to having committed these offenses. The additional evidence that we have into the record is*

really a corroboration of the fact that he has admitted from this stand. So I find that he is a multiple offender."

The Trial Judge erred by not advising Petitioner before taking the witness stand of his right to "remain silent" and not to incriminate himself as to prior felony convictions during the robbery trial or the danger of it being used to enhance a multibill charge that he (the Trial Judge) *KNEW* was forthcoimg [sic] against Petitioner. The Trial Judge had a duty to inform Petitioner of the danger of taking the stand in his own behalf and the consequences of the prior felony convictions being extracted from him and then used against him during the Multiple Offender proceedings. The Trial Judge further erred during the Multiple Offender trial by not advising Petitioner of the right to object to the introduction of his illegal confession of prior felony convictions and of his right to "remain silent" during the enhancement proceedings.

In *Boykin v. Alabama*, 395 U.S. 238, 89 S. Ct. 1709 (1969), the United States Supreme Court articulated the process that was due every defendant who elects to convict himself by a guilty plea in order to insure the unfettered and unencumbered voluntariness of a forfeiture of basic constitutional protections. The Louisiana Supreme Court accepted the *Boykin* procedural safeguards in *State Ex Rel Jackson v. Henderson*, 255 So. 2d 85 (1971). A formidable plethora of jurisprudence has followed in which the Louisiana Supreme Court has steadfastly applied the *Boykin* Rule with adherence even stronger than that advocated in *Boykin*.

In order to competently comply with the *Boykin* Rule, the trial court must advise the defendant of his constitutional right to trial, to confront his accusers, *and against self-incrimination*. In Louisiana the RECORD must affirmatively reflect the trial court's advise [sic] of this trial of rights, and then that the defendant knowingly and intelligently, and voluntarily waived same in order to convict himself.

The prospective application of the *Boykin* Rule applies to *ANY* formal judicial hearing in which one or all the basic Constitutional Rights enunciated in *Boykin* and *State Ex Rel Jackson v. Henderson*, are forfeited by a defendant. R.S. 15:529.1 provides for such a "formal hearing". A multibill offender proceedings in which a defendant relieves the prosecution of its burden of proof by admitting to being the one and same person previously convicted cannot be an exception. *State v. Martin*, 427 So. 2d 1182 (La. 1982); *State v. Johnson*, 432 So. 2d 815 (La. (1983).

But *Martin* and *Johnson* articulated no new rule of law, they simply reinterated [sic] the jurisprudential fountainhead decisions of *Boykin* and *State Ex Rel Jackson v. Henderson* in situations where Louisiana Courts seemingly became remiss in the strick [sic] and accurate compliance therewith.

The Louisiana Supreme Court in *State v. Johnson*, 432 So. 2d 815 (La. 1983), reviewed R.S. 15:529.1(D) and then reversed conviction and sentence by stating:

> "This Section of the statute clearly recognizes that the defendant, if he chooses, has the right to remain silent. Once the defendant chooses to remain silent the state must then by competent

> evidence prove the element of R.S. 15:529.1 before the defendant can be sentenced as an habitual offender. *Before the defendant chooses to acknowledge or confess in open court that he has been previously convicted of a felony, the statute requires that he first be cautioned as to his rights.* R.S. 15:529.1(D) specifically provides the defendant be advised by the court of his right to a 'formal hearing' and to have the state prove its case. *State v. Martin*, 427 So. 2d 1182 (La. 1982). *Further, this Section implictly [sic] provides that the defendant should be advised, by the court, of his statutory right to remain silent."*

It is quite clear, from the foregoing, that the Trial Court adjudicated Petitioner to be a Multiple Offender, not on proof that he was the one and same person previously convicted, *but on his own guilty plea* that was illegally extracted from him during the Robbery Trial and then used against him during the Multiple Offender Trial. There was no waiver by Petitioner of his right to remain silent and against self-incrimination, nor did Petitioner know of such a right, nor did the Trial Judge or anyone else advise Petitioner that he did not have to forfeit his privilege against self-incrimination and that he could remain silent.

An error patent on the face of the record, discoverable by a mere inspection of the pleadings and proceedings, that Petitioner pleaded guilty to being the one and same person, without a valid waiver of his Constitutional Rights against self-incrimination, is a reversable [sic] error and can be heard at any time by the Trial Court and corrected according to law.

Only one conclusion is tendable [sic]: Petitioner *INVOLUNTRARILY* [sic] and *UNKNOWINGLY* forfeited his right against self-incrimination. R.S. 15:529.1 specifically provides for a "formal hearing", and within this forum, the Constitution protects all defendants from an involuntrary [sic] and unknowing waiver of the rights against self-incrimination.

6. There was insufficient evidence produced during Multiple Offender trial to show whether or not the prior felony conviction ended in a *pardon*.

During the course of the Multiple Offender Hearing the State failed to present prima facie evidence showing that Petitioner did not receive a full pardon or the prior felony convictions by the Governor of the State of Mississippi. In *State v. Adams*, 355 So. 2d 917 (La. 1978), the Louisiana Supreme Court held that a full pardon by the Governor precludes use of a pardoned offense to enhance punishment. In *State v. Bennett*, App. 3 Cir. 1988, 524 So. 2d 1297, it reversed a Multiple Offender conviction and sentence by opinionating:

> "Besides the issue of good time, however, *we must also consider the possibility that defendant's sentence was commuted or that he was pardoned."*

R.S. 15:271: Plea of Not Guilty; *Burden of Proof*, states:

> "The plea of not guilty throws upon the State the burden of proving *beyond a reasonable doubt each element of the crime necessary to constitute the defendant's guilt."*

At no time during the Multiple Offender trial was the issue of pardon ever raised. Did the Petitioner receive a full pardon from the Governor in Mississippi on the prior

felony convictions? This is the missing element that must be proved at the Multiple Offender hearing and the reason for such a hearing. The State must prove in Multiple Offender proceedings that a full pardon by the Governor did not take place before, during, or after the prior convictions. The burden of proof is upon the State to prove the allegations within the Bill of Information. *State v. Curtis*, 338 So. 2d 662 (La. 1976); *State v. Lee*, 364 S.2d 1024 (La. 1978).

7. The Evidence introduced by the State as to prior felony convictions was illegally entered. At Tr. 8-9 the prosecutor introduced Exhibit #1 and #2, which are Mississippi felony convictions. There was a "Cover Letter" to the documents certifying them as being the Court Records of Petitioner's prior felony convictions. However, the Trial Judge agreed with Defense Counsel's objections and disallowed the "Cover Letter" and then over Defense Counsel's objections allowed introduction of non-certified Mississippi documents and committed reverseable [sic] error because:

A. The non-certified documents contains a "card" with the name of Richard Frank Trest and a picture from the alleged Mississippi Court without producing anyone from the Mississippi Clerk's Office, where records were purportedlly [sic] kept, to testify as to custody of the records, and that said copies did not contain certificate indicating that it was a copy of the original record purportedlly [sic] kept in Clerk's Office. The prosecutor may not gain a conviction upon uncertified material and said conviction is reversable [sic] under the teachings of *State v. Melton*, App. 2 1984, 456 So. 2d 192, as it provides:

> "Testimony of officer and certificate of court reporter was insufficient foundation to justify admission of uncertified copy of criminal transcript of defendant's prior guilty pleas for sentencing purposes, since it was never established that officer had custody of subject transcript, since no one from Clerk's Office, where records were purportedlly [sic] kept, testified as to custody of record, and since copy did not contain certificate indicating that it was copy of the original record, purportedlly [sic] kept in Clerk's Office."

B. That, assuming, the Mississippi documents were in fact proper, the Trial Judge in this Multiple Offender proceedings could not use same for enhancement purposes in Louisiana because the Louisiana Supreme Court held in *State v. Robicheaux*, 412 So. 2d 1313 (La. 1982), that:

> "The record must reflect that a prior felony conviction by guilty plea, or otherwise, that *the defendant was advised by judge of his right to appeal his conviction and sentence*. Article 1, Section 19, La. Const. 1974."

No where in the Mississippi trial records (Exhibit #1 and #2) can it be found that the judge advised Petitioner of his right to appeal his guilty plea – not a plea bargain – conviction and sentence. Therefore, such a conviction cannot be used in Louisiana for enhancement purposes because Petitioner was unaware of his right to appeal his illegal Mississippi convictions and sentences. The Mississippi records into Multiple Offender evidence does not inform Petitioner of his right to appeal or as to his right to counsel for said appeal as guaranteed by the Sixth Amendment and *Douglas v. California*, 372 U.S. 353, 357,

83 S. Ct. 814, 816, 9 L. Ed. 2d 811, 814 (1963); *State v. Graves*, 246 La. 460, 467, 165 So. 2d 285 (La. 1964). If Petitioner's Mississippi felony convictions are infirm by all of his constitutional rights being unknown to him or offered to him by the Mississippi court, then Louisiana Constitution Article 1, Section 19, disallows enhancement punishment from those unconstitutional convictions in Mississippi.

8. The Trial Court erred by ordering said Second Offender sentence to be without *parole*, probation, or suspension of sentence for thirty-five years because LSA-R.S. 15:574(A)(1) states in pertinent part:

> *". . . . upon conviction of a second felony offense, such person shall be eligible for parole consideration upon serving one-half of the sentence imposed."*

Further, LSA-R.S. 15:529.1(A)(1), the Multiple Offender Statute, does not prohibit parole for Second Offenders. Petitioner was found guilty of being a Second Offender (Tr.25) before this Court under the Multiple Offender Act. However, LSA-R.S. 14:64 – Armed Robbery – Petitioner's original sentence, *prohibits parole*, and confused the Trial Judge.

Accordingly, Petitioner should be resentenced in conformity to law *with benefit of parole* eligibility.

9. The Trial Court erred by not indicating the factors it had considered for imposing the sentencing in the record as required by LSA-R.S. C. Cr. P. Article 894.1. The Trial Judge was required to *"state for the record the considerations taken into account and the factual basis therefor in imposing sentence"* as required by Art 894.1(C). In spite of the fact that this was a Multiple Offender Proceedings

and the Court sentenced Petitioner to less than the maximum term allowed by law, it still requires the sentencing judge to articulate his reason for the sentence and to consider any and all mitgating [sic] factors. These requirements are an essential aid to the appellate courts when reviewing a sentence for excessiveness and abuse of discretion. *State v. Spencer*, 374 So. 2d 1195 (La. 1975). Article 894.1 sets forth three factors which justify a sentence of incarceration and eleven factors which, although not excusing the defendant's conduct, tend to lessen his culpability. The Trial Judge is required to state for the record both the considerations he had taken into account and the factual basis for the imposition of sentence, particularizing the sentence. *State v. Jackson*, 360 So. 2d 842 (La. 1978). In all Multiple Offender proceedings these requirements must be followed or require reversal. *State v. Spears*, App. 1 Cir. 1984, 459 So. 2d 1328, writ denied 463 So. 2d 600; *State v. Sheppard*, App. 1 Cir. 1985, 472 So. 2d 267; *State v. Hudson*, App. 3 Cir. 1985, 463 So. 2d 93; *State v. Kenner*, 384 So. 2d 413 (La. 1980); *State v. Walker*, 416 So. 2d 534 (La. 1982).

In the instant Multiple Offender proceedings, Judge Lowe failed to make mention of Article 894.1 whatsoever or for his reasons for imposing a thirty-five year term and simply did not follow the law as required by the Code.

Even without formal contemporaneous objection, where the trial court imposed a sentence, without adequate compliance with mandatory statutory requirements and basis for sentence does not appear in the record, the sentence must be set aside. *State v. Dokes*, 398 So. 2d 1025 (La. 1981).

Accordingly, this Court should annual [sic] and set aside the Multiple Offender sentence and order Petitioner remanded to the jurisdiction of the 26th Judicial District Court for resentencing according to law and authority of the State of Louisiana.

INASMUCH as the proof in this case was a Multiple Offender, was not only invalid, but *INSUFFICIENT,* and unconstitutional, the double jeopardy prescriptions of State and Federal Constitutions bar resentencing pursuant to R.S. 15:529.1. See State v. Johnson, 432 So. 2d headnote #4 815 (La. 1983), which provides:

> "Pursuant to principle of double jeopardy, defendant who habitual offender conviction was reversed because he had been compelled to give evidence against himself *could not be tried again* on question of prior felony question. U.S.C.A. Const. Amend 5: LSA-Const. Art. 1, Sec. 16; LSA-R.S. 15:529.1"

In *Bullard v. Estelle,* 665 F. 2d 1347, cert. granted 102 S. Ct. 2927, 457 U.S. 1116, 73 L. Ed. 2d 1328, vacated 103 S. Ct. 776, on remand, 708 F. 2d 1020 (5th Cir. 1984), it was held:

> "Double jeopardy clause would prohibit resentencing of a defendant under habitual offender statute if State failed to provide sufficient evidence of habitual offender status at first trial." Also see *French v. Estelle,* 692 F. 2d 1021, rehearing denied, 692 F. 2d 318 and 698 F. 2d 1216, cert. denied 103 S. Ct. 2108 (5th Cir. 1982).

WHEREFORE, Petitioner prsys [sic] that this Honorable Court will grant relief to him according to law upon the above cited errors.

Respectfully Submitted.

/s/ Richard Franklin Trest

Richard Franklin Trest
Petitioner Pro Se
91171 Camp C, Tiger 3-R-7
Louisiana State Penitentiary
Angola, Louisiana 70712

Prepared by:

Legal Aid Office
Camp C
Louisiana State Penitentiary
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STATE OF LOUISIANA — NUMBER: 56,595

VERSUS — 26TH JUDICIAL DISTRICT COURT

RICHARD FRANKLIN TREST — BOSSIER PARISH, LOUISIANA

(Filed March 26, 1990)

REASONS FOR DENIAL OF POST CONVICTION RELIEF

Defendant, Richard Franklin Trest, filed this application for Post Conviction Relief. Defendant alleges that the sentence imposed by this court in the above numbered and captioned matter is illegal in that the Multiple Offender proceedings were contrary to the provisions of R.S. 15:529.1, that the trial court erred by imposing sentence to be served without benefit of parole, and that the trial court failed to indicate the factors for imposing such sentence as required by C.Cr.P. Article 894.1. Defendant's individual claims with regard to the Multiple Offender Bill of Information proceedings are enumerated in Paragraph 3 of his application for Post Conviction Relief.

Defendant raises no substantive issues regarding the Multiple Offender proceedings. His attack on the technical aspect of the proceedings lack merit. The record clearly proves that Defendant is the same person who was convicted in Sunflower County, Mississippi of five counts of "Burglary and Larceny", which would be a felony if charged under the laws of Louisiana. Defendant was not required to testify during the Multiple Offender

proceedings. Although Defendant testified at trial that he did in fact commit those crimes for which he was charged and, subsequently, convicted in the State of Mississippi, the proof submitted by the State at the Multiple Offender proceedings was sufficient beyond a reasonable doubt to prove that Defendant was indeed the same person without the court's consideration of Defendant's incriminating statements during trial.

Further, Defendant alleges that his sentence is illegal because the court directed that the sentence be served without benefit of parole. R.S. 14:64, the statute under which Defendant was charged in this case, was amended by Acts 1966, Ex.Sess.No.5,Sec.1. That amendment provided that whoever commits the crime of armed robbery shall be imprisoned at hard labor for not less than five years and for not more than ninety-nine years at hard labor, without benefit of *parole*, probation or suspension of sentence. Therefore, Defendant was legally sentenced to serve thirty-five (35) years at hard labor, without benefit of parole, probation, or suspension of sentence.

Finally, the transcript of the Multiple Offender proceedings which is filed in the record indicates that the trial judge stated his reasons for sentencing Defendant to only two years more than the minimum sentence for which Defendant was eligible as a second offender.

For the foregoing reasons, the application for Post Conviction Relief is hereby denied.

Thus done and signed this 26th day of March, 1990 at Benton, Louisiana.

/s/ Harmon Drew, Jr.
HARMON DREW, JR.
DISTRICT JUDGE

The Supreme Court of the State of Louisiana

STATE EX REL RICHARD FRANKLIN TREST — NO. 90-KH- 1609

VS.

LARRY SMITH, WARDEN LOUISIANA STATE PENITENTIARY — (Filed May 20, 1991)

IN RE: Trest, Richard Franklin; – Plaintiff(s); Applying for Writ of Supervisory and/or Review; Parish of Bossier 26th Judicial District Court Div. "D" Number 56,595

May 17, 1991

Denied.

Supreme Court of Louisiana
May 17, 1991

/s/ Illegible
Deputy Clerk of Court
For the Court

PETITION UNDER 28 USC § 2254 FOR WRIT OF HABEAS CORPUS BY A PERSON IN STATE CUSTODY

(Filed Sep. 30, 1991)

UNITED STATES DISTRICT COURT

District

Name
RICHARD FRANKLIN TREST

Prisoner No.
D.O.C. #91171

Docket No.

Place of Confinement
Camp C-Bear, # ___, Louisiana State Penitentiary, Angola, Louisiana 70712

Name of Petitioner (include name upon which convicted)
Richard Franklin Trest

Name of Respondent (authorized person having custody of petitioner)
V. John P. Whitley, Warden sub. Nom. Larry Smith

The Attorney General of the State of:

PETITION

1. Name and location of court which entered the judgment of conviction under attack 26th Judicial District Court, Bossier Parish, Benton, Louisiana

2. Date of judgment of conviction June 8, 1979

3. Length of sentence Thirty-five (35) years without benefit of parole, probation, or suspension of sentence.

4. Nature of offense involved (all counts) Multiple Offender (R.S. 15:529.1) Second Offender (Armed Robbery)

5. What was your plea? (Check one)

   (a) Not guilty [XX]
   (b) Guilty [ ]
   (c) Nolo contendere [ ]

   If you entered a guilty plea to one count or indictment, and a not guilty plea to another count or indictment, give details:

   N/A No Answer or Not Appropriate

6. Kind of trial: (Check one)

   (a) Jury [XX] at Armed Robbery trial, Judge at HFC trial.
   (b) Judge only [ ]

7. Did you testify at the trial?

   Yes [X] No [ ]
   Petitioner testified at the Armed Robbery trial, but did not testify at HFC trial.

8. Did you appeal from the judgment of conviction?

   Yes [ ] No [ ]
   Petitioner does not know if an appeal was perfected

9. If you did appeal, answer the following:

   (a) Name of court N/A
   (b) Result N/A
   (c) Date of result N/A
   (d) Grounds raised N/A

10. Other than a direct appeal from the judgment of conviction and sentence, have you previously filed any petitions, applications, or motions with respect to this judgment in any court, state or federal?

    Yes [XX] No [ ]

11. If your answer to 10 was "yes," give the following information:

    (a) (1) Name of court 26th Judicial District Court, Benton, Louisiana

    (2) Nature of proceeding Post Conviction/ Writ of Habeas Corpus

    (3) Grounds raised The Entire Multiple Offender Proceedings Were In Violation of LSA-R.S. 15:529.1

    (4) Did you receive an evidentiary hearing on your petition, application or motion?

    Yes [ ] No [X]

    (5) Result Denied

    (6) Date of result

    (b) As to any second petition, application or motion give the same information:

    (1) Name of court Louisiana Supreme Court

    (2) Nature of proceeding Post Conviction/ Writ of Habeas Corpus

    (3) Grounds raised Same as in the 26th Judicial District Court

    (4) Did you receive an evidentiary hearing on your petition, application or motion?

    Yes [ ] No [XX]

    (5) Result Denied

    (6) Date of result

    (c) As to any third petition, application or motion, give the same information:

    (1) Name of court Petitioner applies to this Court for Relief:

    (2) Nature of proceeding Post Conviction/ Writ of Habeas Corpus

    (3) Grounds raised Petitioner maintains the same posture as he did in State Court(s):

    (4) Did you receive an evidentiary hearing on your petition, application or motion?

    Yes [ ] No [ ]

    (5) Result

    (6) Date of result

    (d) Did you appeal to the highest state court having jurisdiction the result of action taken on any petition, application or motion?

    (1) First petition, etc. Yes [ ] No [ ]

    (2) Second petition, etc. Yes [ ] No [ ]

    (3) Third petition, etc. Yes [ ] No [ ]

    (e) If you did *not* appeal from the adverse action on any petition, application or motion, explain

briefly why you did not: The Multiple Offender proceedings was protested during trial. It is not known if any appeal was taken on the issue.

12. State *concisely* every ground on which you claim that you are being held unlawfully. Summarize *briefly* the *facts* supporting each ground. If necessary, you may attach pages stating additional grounds and *facts* supporting same.

CAUTION: *In order to proceed in the federal court, you must ordinarily first exhaust your available state court remedies as to each ground on which you request action by the federal court. If you fail to set forth all grounds in this petition, you may be barred from presenting additional grounds at a later date.*

For your information, the following is a list of the most frequently raised grounds for relief in habeas corpus proceedings. Each statement preceded by a letter constitutes a separate ground for possible relief. You may raise any grounds which you may have other than those listed if you have exhausted your state court remedies with respect to them. However, *you should raise in this petition all available grounds* (relating to this conviction) on which you base your allegations that you are being held in custody unlawfully.

Do not check any of these listed grounds. If you select one or more of these grounds for relief, you must allege facts. The petition will be returned to you if you merely check (a) through (j) or any one of these grounds.

(a) Conviction obtained by plea of guilty which was unlawfully induced or not made voluntarily with understanding of the nature of the charge and the consequences of the plea.

(b) Conviction obtained by use of coerced confession.

(c) Conviction obtained by use of evidence gained pursuant to an unconstitutional search and seizure.

(d) Conviction obtained by use of evidence obtained pursuant to an unlawful arrest.

(e) Conviction obtained by a violation of the privilege against self-incrimination.

(f) Conviction obtained by the unconstitutional failure of the prosecution to disclose to the defendant evidence favorable to the defendant.

(g) Conviction obtained by a violation of the protection against double jeopardy.

(h) Conviction obtained by action of a grand or petit jury which was unconstitutionally selected and impaneled.

(i) Denial of effective assistance of counsel.

(j) Denial of right of appeal.

A. Ground one: Denial of Due Process of the Law in Violation of the Fourteenth Amendment of the United States Constitution in that the Entire Multiple Offender Proceedings was Unconstitutional:

Supporting FACTS (tell your story *briefly* without citing cases or law): See attached Memorandum of Law for facts, claim, and legal argument.

B. Ground two: None

Supporting FACTS (tell your story *briefly* without citing cases or law): _____

C. Ground three: None

Supporting FACTS (tell your story *briefly* without citing cases or law): _____

D. Ground four: None

Supporting FACTS (tell your story *briefly* without citing cases or law): _____

13. If any of the grounds listed in 12A, B, C, and D were not previously presented in any other court, state or federal, state *briefly* what grounds were not so presented, and give your reasons for not presenting them: None

14. Do you have any petition or appeal now pending in any court, either state or federal, as to the judgment under attack?

Yes [ ] No [XX]

15. Give the name and address, if known, of each attorney who represented you in the following stages of the judgment attacked herein:

(a) At preliminary hearing Patrick Phillips, Indigent Defenders Program, Benton, Louisiana

(b) At arraignment and plea Same

(c) At trial Same

(d) At sentencing Same

(e) On appeal Unknown

(f) In any post-conviction proceeding None

(g) On appeal from any adverse ruling in a post-conviction proceeding None

16. Were you sentenced on more than one count of an indictment, or on more than one indictment, in the same court and at the same time?

Yes [ ] No [X]

17. Do you have any future sentence to serve after you complete the sentence imposed by the judgment under attack?

Yes [X] No [ ]

(a) If so, give name and location of court which imposed sentence to be served in the future: 20th Judicial District Court, St. Francisville, Louisiana

(b) Give date and length of the above sentence: (-4-86 -Attempted Simple Escape One (1) Year:

(c) Have you filed, or do you contemplate filing, any petition attacking the judgment which imposed the sentence to be served in the future?

Yes [ ] No [X]

Wherefore, petitioner prays that the Court grant petitioner relief to which he may be entitled in this proceeding.

_____
Signature of Attorney (if any)

I declare under penalty of perjury that the foregoing is true and correct. Executed on

8/13/91
(date)

/s/ Richard F. Trest
Signature of Petitioner

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
SHREVEPORT DIVISION

(Title Omitted)

MEMORANDUM OF LAW SUPPORTING

APPLICATION FOR WRIT OF HABEAS CORPUS

(Filed Sept. 30, 1991)

MAY IT PLEASE THE COURT:

NOW COMES RICHARD FRANKLIN TREST, petitioner herein, moving the Court via an application for Writ of Habeas Corpus for RELIEF for the following reasons to-wit:

Petitioner filed for Post Conviction Relief in the 26th Judicial District Court and the Court denied relief on March 26, 1990.

Petitioner filed into the Louisiana Supreme Court for Post Conviction Relief and that Court denied relief on May 17, 1991, without a written opinion.

Wherefore petitioner has properly exhausted State Remedies and properly comes into Federal Court seeking relief.

Petitioner submits that the 26th Judicial District Court and the Louisiana Supreme Court did not follow precedented cases in denying relief.

STATEMENT OF THE CASE

Petitioner, RICHARD FRANKLIN TREST, was charged by Bill of Information for Armed Robbery, a

violation of LSA-R.S. 14:64. After a trial by 12 man jury with Court-Appointed Counsel, Mr. Patrick Phillips, petitioner was convicted as charged on March 29, 1979. The State then filed a Multiple Offender Bill of Information under the provisions of LSA-R.S. 15:529.1 charging petitioner as a Second Offender. See Exhibit "A" attached hereto. Petitioner was subsequently convicted and sentenced to an enhancement term of thirty-five (35) years without benefit of *parole*, probation, or suspension of sentence by the Honorable Cecil C. Lowe, Judge, on June 8, 1979. See Exhibit "B" attached hereto.[1]

Petitioner now attacks the entire Multiple Offender proceedings as being contrary to R.S. 15:529.1 in this litigation.

STATEMENT OF THE CLAIMS

1. The Trial Court erred by not quashing the Multiple Offender Bill of Information as being vindictive by the prosecutor.
2. The Trial Court failed the inform petitioner of the right to be tried as to he [sic] truth of the Multiple Offender Bill of Information and as to a "formal hearing".
3. The Trial Court failed to inform petitioner of the requirement to say whether the allegations within the Multiple Offender charge were true.
4. The Trial Court erred by allowing defense counsel to enter the not guilty plea to said charge.

---

[1] See Multiple Offender Transcript attached hereto and referred as "tr. ___ from this point onward.

5. The Trial Court failed to advise petitioner of the right to "remain silent" and not to incriminate himself as to prior felony conviction.
6. There was insufficient evidence during Multiple Offender trial to show whether or not the prior felony conviction ended in a pardon.
7. The evidence introduced by the State as to prior felony convictions was illegally entered into evidence.
8. The Trial Court erred by ordering said Second Offender sentence to be without parole.
9. The Trial Court erred by not indicating the factors it had considered for imposing the sentencing in the record as required by LSA-C.Cr.P. Article 894.1.

ARGUMENT

Because the Multiple Offender issues involved in this petition are interrelated they will not be bifurcated herein and will be argued collectively.

The Multiple Offender Statute, LSA-R.S. 15:529.1(D), states in pertinent part:

> ". . . Whereupon the court in which the subsequent conviction was had *shall* cause the person, whether confined in prison or otherwise, to be brought before it and *shall* inform him of the allegations contained in the information and of his right to be tried to the truth thereof according to law and *shall* require the offender to say whether the allegations are true."

1. The Trial Court erred by not quashing the Multiple Offender Bill of Information as being vindictive by

the prosecutor. At Tr. 5-6 the prosecutor, Mr. Alexander L. Blondeau, Jr., testified that he had threaten to Multibill Petitioner if he did not plead guilty to the Armed Robbery charge and stated at tr. 6:

> "A. If he was convicted and went to trial, I said I would file a Multiple Offender Bill and I have honored my promise to you."

The only issue raised by the Defense before the jury was whether petitioner committed Armed Robbery or Simple Robbery. There was no doubt of guilt in the case – just the grade of guilt and the grade of crime was the core Petitioner was willing to plead guilty to Simple Robbery, but the prosecutor refused to accept the plea and wanted a guilty plea to Armed Robbery with no plea bargain.

Petitioner relied on *Hayes v. Cowan*, 547 F.2d 42 (5th Cir. 1976), which provides in pertinent part:

> "Prosecutor may not charge habitual offender act against prisoner for refusing to plead guilty to lesser offense and demanding trial."

Accordingly, the Trial Court erred in not quashing the Multiple Offender Bill of Information as being vindictive.

2. The Trial Court failed to inform Petitioner of the right to be tried as to the truth of the Multiple Offender allegations. In *State v. Johnson*, 432 So.2d 815 (La. 1983), the multiple offender record must show that the offender was told by the Trial Judge of the right to a formal hearing or else cause reversable [sic] error as the Louisiana Supreme Court held:

> ". . . R.S. 15:529.1(D) specifically provides the *defendant be advised by the court* to a

> 'formal hearing' and to have the State prove its case."

In *State v. Griffin*, App. 1 Cir. 1988, 525 So.2d 705, the Court of Appeals held that it would be a reversable [sic] error to not inform the defendant of *"his right to be tried as to the truth of the allegations."* Also see *State v. Easton*, App. 2 Cir. 1985, 463 So.2d 783.

3. The trial Court failed to inform petitioner of the requirement to say whether the allegations within the Multiple Offender charge were true. Failure of Trial Judge to inform petitioner of this requirement is reversable [sic] error as *State v. Easton*, App. 2 Cir. 1985, 463 So.2d 783, held that:

> "Failure of trial court in prosecution for a purse snatching and second-degree battery to inform defendant of nature of allegations in habitual offender bill of information or of his right to be tried as to the truth thereof, and *failure to require defendant to say whether the allegations were true-* . . . constituted error patent on the record, *requiring that sentence be vacated and cause remanded for further sentencing proceedings."*

At no time did the Trial Judge ask petitioner if the allegations within the Multiple Offender Bill were true – The Judge obly [sic] asked for him to enter a plea to the Bill of Information, in which Defense Counsel entered a not guilty plea.

4. The Trial Judge erred by allowing Defense Counsel, Mr. Patrick Phillips, to enter the not guilty plea, rather than requiring petitioner to enter the plea to the Multiple Offender proceedings, because Section "D" of R.S. 15:529.1 provides that the court " . . . *shall require the offender to say whether the allegations are true." State v. Easton*, App. 2 Cir. 1985, 463 So.2d 783.

Further, La.C.Cr.P Article 553 requires that felony charged defendants "shall plead in person". Article 554 profides [sic] that "A defendant shall plea when arraigned". No where in the Code does it provide for a lawyer to enter a plea in multiple offender proceedings on behalf of the defendant. At no time did this petitioner enter the plea, or waive his right to make the plea, or approve of the not guilty plea, or instruct Defense Counsel to enter such a plea.

5. The Trial Court failed to advise petitioner of the right to "remain silent" and not to incriminate himself as to prior felony convictions. During the course of the Armed Robbery trial, petitioner took the witnesses stand and testified that he committed a crime, but it was Simple Robbery – not Armed Robbery. Before, during, and while on the stand before the jury, the prosecutor, Defense Counsel, and Trial Judge *KNEW* that if he was convicted by jury for Simple or Armed Robbery that the prosecutor was going to Multibll [sic] petitioner. During petitioner's testimony it was extracted from petitioner that he had been felony convicted in Mississippi and the Trial Judge used this admission of prior guilt, during the Multiple Offender Trial, to adjudicate guilt as to the Multiple Offender Bill of Information by holding at Tr. 25:

> "THE COURT: Of course the Court can take judicial notice of what goes on in its own courtroom. *Mr. Trest at the trial of this case which I presided over took the stand stand [sic] and testified and freely admitted. to having committed the offenses. The additional evidence that we have into the record is really a corroboration of the fact that he has admitted from this stand. So I find that he is a multiple offender.*"

The Trial Judge erred by not advising petitioner before taking the witness stand of his right to "remain silent" and not to incriminate himself as to prior felony convictions during the robbery trial or the danger of it being used to enhance a multibill charge that he (the Trial Judge) *KNEW* was forthcoming against petitioner. See *State v. Gibson*, 572 So.2d 666 (La.App. 5 Cir. 1990). Gibson was not advised of his right to remain silent when he took witness stand. (Multiple Offender Hearing). The Trial Judge had a duty to inform petitioner of the danger of taking the stand in his own behalf and the consequences of the prior felony convictions being extracted from him and then used against him during the Multiple Offender proceedings. The Trial Judge further erred during the Multiple Offender trial by not advising petitioner of the right to object to the introduction of his illegal confession of prior felony convictions and of his right to "remain silent" during the enhancement proceedings.

In *Boykin v. Alabama*, 395 U.S. 238, 89 S.Ct. 1709 (1969), the United States Supreme Court articulated the process that was due every defendant who elects to convict himself by a guilty plea in order to insure the unfettered and unencumbered voluntariness of a forfeiture of basic constitutional protections. The Louisiana Supreme Court accepted the *Boykin* procedural safeguards in *State Ex Rel Jacksone* [sic] *v. Henderson*, 255 So.2d 85 (1971). A formidable plethora of jurisprudence has followed in which the Louisiana Supreme Court has steadfastly applied the *Boykin* Rule with adherence even stronger than that. advocated in *Boykin*.

In order to competently comply with the *Boykin* Rule, the trial court must advise the defendant of his constitutional right to trial, to confront his accusers, *and against self-incrimination*. In Louisiana the RECORD must affirmatively reflect the trial court's

advise [sic] of this tial [sic] of rights, and then that the defendant knowingly and intelligently, and voluntarily waived same in order to convict himself.

The prospective application of the *Boykin* Rule applies to *ANY* formal judicial hearing in which one or all the basic Constitutional Rights enunciated in *Boykin* and *State Ex Rel Jackson v. Henderson*, are forfeited by a defendant. R.S. 15:529.1 provides for such a "formal hearing". A multibill offender proceedings in which a defendant relieves the prosecution of its burden of proof by admitting to being the one and same person previously convicted cannot be an exception. *State v. Martin*, 427 So.2d 1182 (La. 1982); *State v. Johnson*, 432 So.2d 815 (La. 1983).

But *Martin* and *Johnson* articulated ho [sic] new rule of law, they simply reinterated [sic] the jurisprudential fountainhead decisions of *Boykin* and *State Ex Rel Jackson v. Henderson* in situations where Louisiana Courts seemingly became remiss in the strick [sic] and accurate compliance therewith.

The Louisiana Supreme Court in *State v. Johnson*, 432 So.2d 815 (La. 1983), reviewed R.S. 15:529.1(D) and then reversed conviction and sentence by stating:

> "This Section of the statute clearly recognizes that the defendant, if he chooses, has the right to remain silent. One the defendant chooses to remain silent the state must then by competent evidence prove the element or R.S. 15:529.1 before the defendant can be sentenced as an habitual offender. *Before the defendant choose to acknowledge or confess in open court that he has been previously convicted of a felony, the statute requires that he first be cautioned as to his rights.* R.S. 15:529.1(D) specifically provides the defendant be advised by the court of his right to a 'formal hearing' and to have the state prove its case. *State v. Martin*, 427 So.2d 1182 (La. 1982). *Further, the Section implictly* [sic] *provides that the defendant should be advised, by the court, of his statutory rihgt* [sic] *to remain silent."*

It is quite clear, from the foregoing, that the Trial Court adjudicated petitioner to be a Multiple Offender, not on proof that he was the one and same person previously convicted, *but on his own guilty plea* that was illegally extracted from him during the Robbery Trial and then used against him during the Multiple Offender Trial. There was no waiver by petitioner of his right to remain silent andagaisnt [sic] self-incrimination, nor did petitoner [sic] know of such a right, nor did the Trial Judge or anyone else advise petitioner that he did not have to forfeit his privilege against self-incrimination and that he could remain silent.

An error patent on the face of the record, discoverable by a mere inspection of the pleading and proceddings [sic], that petitioner pleaded guilty to being the one and same person, without a valid waiver of his Constitutional Rights against self-incrimination, is a reversable [sic] error and can be heard at any time by the Trial Court and corrected according to law.

Only one conclusion is tendable [sic]: Petitioner *INVOLUNTRARTILY* [sic] and *UNKNOWINGLY* forfeited his right against self-incrimination. R.S. 15:529.1 specifically provides for a "formal hearing", and within this forum, the Constitution protects all defendants from an involuntrary [sic] and unknowing waiver of the rights against self-incrimination.

6. There wa [sic] insufficient evidence produced during Multiple Offender trial to show whether or not the prior felony conviction ended in a *pardon*.

During the course of the Multiple Offender Hearing the State failed to present prima facie facie [sic] evidence showing that petitioner did not receive a full pardon on the prior felony convictions by the Governor of the State of Mississippi. In *State v. Adams*, 355 So.2d 917 (La. 1978), the Louisiana Supreme Court held that a full pardon by the Governor precludes use of a pardoned offense to enhance punishment. In *State v. Bennett*, App. 3 Cir. 1988, 524 So.2d 1297, it reversed a Multiple Offender conviction and sentence by opinionating:

> "Besides the issue of good time, however, *we must also consider the possibility that defendant's sentence was commuted or that he was pardoned.*"

R.S. 15:271: Plea of Not Guilty; *Burden of Proof*, states:

> "The plea of not guilty throws upon the State the burden of proving *beyond a reasonable doubt each element of the crime necessary to constitute the defendant's guilt.*"

At not [sic] time during the Multiple Offender trial was the issue of pardon ever raised. Did the petitioner receive a full pardon from the Governor in Mississippi on the prior felony convictions? This is the missing element that must be proved at the Multiple Offender hearing and the reason for such a hearing. The State must prove in Multiple Offender proceedings that a full pardon by the Governor did not take place before, during, or after the prior convictions. The burden of proof is upon State to prove the allegations within the Bill of Information. *State v. Curtis*, 338 So.2d 662 (La. 1976); *State v. Lee*, 364 So.2d 1024 (La. 1978).

7. The Evidence introduced by the State as to prior felony convictions was illegally entered. At. Tr. 8-9 the prosecutor introduced Exhibit #1 and #2, which are Mississippi felony convictions. There was a "Cover Letter" to the documents certifying them as being the Court Records of Petitioner's prior felony convictions. However, the Trial Judge agreed with Defense Counsel's objections and disallowed the "Cover Letter" and then over Defense Counsel's objections allowed introduction of non-certified Mississippi documents and committed reverseble [sic] error because:

A. The non-certified documents contains a "card" with the name or [sic] Richard Frank Trest and a picture from the alleged Mississippi Court without producing anyone from the Mississippi Clerk's Clerk's Office, where records were purportedly kept, to testify as to custody of the records, and that said copies did not contain certificate indicating that it was a copy or the original record purpordedly [sic] kept in Clerk's Office. The prosecutor may not gain a conviction upon uncertified material and said conviction is reversible under the teachings of *State v. Melton*, App. 2 1984, 456 So.2d 192, as it provides:

> "Testimony of officer and certificate of court reporter was insufficient foundation to justify admission of uncertified copy of criminal transcript of defendant's prior guilty pleas for sentencing purposes, since it was never established that officer had custody of subject transcript, sine [sic] no one from Clerk's Office, where records were purportedly kept, testified as to custody of record, and since copy did not contain certificate indicating that it was copy of

the original record, purportedly kept in Cl[illegible]'s Office."

B. That, assuming, the Mississippi documents were in fact proper, the Trial Judge in this Multiple Offender proceedings could not use same for enhancement purposes in Louisiana because the Louisiana Supreme Court held in *State v. Robicheaux*, 412 So.2d 1313 (La. 1982), that:

> "The record must reflect that a prior felony conviction by guilty plea, or otherwise, that *the defendant was advised by judge of his right to appeal his conviction and sentence.* Article 1, Section 19, La. Const. 1974."

No where in the Mississippi trail [sic] records (Exhibit #1 and #2) can it be found that the judge advised petitioner of his right to appeal his guilty plea – not a plea bargain – conviction and sentence. Therefore, such a conviction cannot be used in Louisiana for enhancement purposes petitioner was unaware of his right to appeal his illegal Mississippi convictions and sentences. The Mississipi [sic] records into Multiple Offender evidence does not inform petitioner of his right to appeal or as to his right to counsel for said appeal as guaranteed by the Sixth Amendment and *Douglas v. California*, 372 U.S. 353, 357, 83 S.Ct. 814, 816, 9 L.Ed.2d 811, 814 (1963) *State v. Graves*, 246 La. 460, 467, 165 So.2d 285 (La. 1964). If petitioner's Mississippi felony convictions are infirm by all of his constitutional rights being unknown to him or offered to him by the Mississippi court, then Louisiana Constitution Article 1, Section 19, disallows enhancement punishment from those unconstitutional convictions in Mississippi.

8. The Trial Court erred by ordering said Second Offender sentence to be without *parole*, probation, or

suspension of sentence for thirty-five years because LSA-R.S 15:574(A) (1) states in pertinent part:

> *"... upon conviction of a second felony offense, such person shall be eligible for parole consideration upon serving one-half of the sentence imposed."*

Further, LSA-R.S. 15:529.1(A) (1), the Multiple Offender Statute, does not prohibit parole for Second Offenders. Petitioner was found guilty of being a Scond [sic] Offender (Tr.25) before this Court under the Multiple Offender Act. However, LSA-R.S. 14:64 – Armed Robbery – petitioner's original sentence, *probibits* [sic] *parole*, and confused the Trial Judge.

Accordingly, petitioner should be resentenced in conformity to law *with benefit of parole* eligibility.

9. The Trial Court erred by not indicating the factors it had considered for imposing the sentencing in the record as required by LSA-R.S. C.Cr.P. Article 894.1. The Trial Judge was required to *"state for the record the considerations taken into account and the factual basis therefor in imposing sentence"* as required by Art 894.1(C). In spite of the fact that this was a Muliple [sic] Offender proceedings and the Court sentenced petitioner to less than the maximum term allowed by law, it still requires the sentencing judge to articulate his reason for the sentence and to consider any all mitgating [sic] factors. These requirements are an essential aid to the appellate courts when reviewing a sentence for excessiveness and abuse of discretion. *State v. Spencer*, 374 So.2d 1195 (La. 1975). Article 894.1 sets forth three factors which justify a sentence of incarceration and eleven factors which, although not excusing the defendant's conduct, tend to lessen his culpability. The Trial Judge is required to state for the record both the considerations he had taken into account and the factual basis for the imposition of

sentence, particularizing the sentence. *State v. Jackson*, 360 So.2d 842 (La. 1978). In all Multiple Offender proceedings these requirements must be followed or require reversal. *State v. Spears*, App. 1 Cir. 1984, 459 So.2d 1328, writ denied 463 S0.2d 600; *State v. Shippard*, App. 1 Cir. 1985, 472 So.2d 267 *State v. Hundson*, App. 3 Cir. 1985, 463 So.2d 93; *State v. Kenner*, 384 So.2d 413 (La. 1980); *State v. Walker*, 416 So.2d 534 (La. 1982).

In the instant Multiple Offender proceedings, Judge Lowe failed to make mention to Article 894.1 whatsoever or for his rasons [sic] for imposing a thirty-five year term and simply did not follow the law as required by the Code.

Even Without formal contemporaneous objection, where the trial court imposed a sentence, without adequate compliance with mandatory statutory requirements and basis for sentence does not appear in the record, the sentence must be set aside. *State v. Dokes*, 398 So.2d 1025 (La. 1981).

Accordingly, this Court should annual [sic] and set aside the Mulitple [sic] Offender sentence and order petitioner remanded to the jurisdiction of the 26th Judicial District Court for resentencing according to law and authority of the State of Louisiana.

INASMUCH as the proof in this case was a Multiple Offender, was not only invalid, but *INSUFFICIENT*, and unconstitutional, the double jeopardy prescriptions of State and Federal Constitutions bar resentencing pursuant to R.S. 15:529.1. *State v. Johnson*, 432 So.2d headnote #4 815 (La. 1983), which provides:

> "Pursuant to principle of double jeopardy, defendant who habitual offender conviction

> was reversed because he had been compelled to give evidence against himself *could not be tried again* on question of prior felony question. U.S.C.A. Const. Amend 5; LSA-Const. Art. 1, Sec. 16; LSA-R.S. 15:529.1"

In *Bullard v. Estelle*, 665 F.2d 1347, cert. granted 102 S.Ct. 2927, 457 U.S. 1116, 73 L.Ed.2d 1328, vacated 103 S.Ct. 776, on remand, 708 F.2d 1020 (5th Cir. 1984), it was held:

> "Double clause would prohibit resentencing of a defendant under habitual offender statute if State failed to provide sufficient evidence of habitual offender status at first trial." Also see *French v. Estelle*, 692 F.2d 1021, rehearing denied, 692 F.2d 318 and 698 F.2d 1216, cert. denied 103 S.Ct. 2108.

WHEREFORE, petitioner prays that this Honorable Court will grant relief to him according to law upon the above cited errors.

Rsepectfully [sic] submitted,

/s/ Richard F. Trest
Richard Franklin Trest
Petitioner Pro Se
D.O.C. #91171
Camp-C-Bear #1
Louisiana State Penitentiary
Angola, Louisiana 70712

(Attachments Omitted)

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF LOUISIANA
SHREVEPORT DIVISION

RICHARD FRANKLIN TREST	**CIVIL ACTION NO. 91-2131**
VERSUS	**JUDGE STAGG – SECTION P**
JOHN P. WHITLEY, WARDEN, LOUISIANA STATE PENITENTIARY, ET AL	**MAGISTRATE JUDGE PAYNE**
	(Filed Dec. 19, 1991)

MEMORANDUM ORDER

Before the Court is an application for a writ of *habeas corpus* filed in *forma pauperis* by *pro se* petitioner, **Richard Franklin Trest,** pursuant to 28 U.S.C. § 2254. Petitioner challenges his 1979 conviction as a Multiple Offender (La.R.S. 15:529.1) and a Second Offender of armed robbery. He was sentenced to 35 years of incarceration without benefit of parole, probation or suspension of sentence by the Twenty-Sixth Judicial District Court, Bossier Parish, Louisiana. He is presently confined in the Louisiana State Penitentiary, in Angola, Louisiana ("Angola"). Named as respondent is the warden at Angola, John P. Whitley.

Petitioner claims that he has exhausted state court remedies by application for post conviction relief/writ of habeas corpus in the Twenty-Sixth Judicial District Court, and to the Louisiana Supreme Court which both denied

him relief. Petitioner contends his incarceration is unconstitutional based on the single argument that he was denied due process in violation of the Fourteenth Amendment of the United States Constitution "in that the Entire Multiple Offender Proceedings was Unconstitutional". In order for this Court to determine what action, if any, shall be taken on this application;

THE CLERK IS DIRECTED to serve by mail, a copy of the application and this Order on the Attorney General for the State of Louisiana, the District Attorney for the judicial district where petitioner was convicted, and the respondent; and to serve petitioner with a copy of this Order only.

IT IS ORDERED that respondent, through the District Attorney, file within thirty (30) days after the date of service of summons:

1. An answer to the application.

(a) The answer shall state whether petitioner has exhausted state remedies, including any post-conviction remedies available to him under Louisiana law, by properly presenting to all lower courts and the Supreme Court of Louisiana *all* issues raised in this petition.

(b) In the event the State contends that it has been prejudiced in its ability to respond by petitioner's delay in filing or that the petition is a second or successive petition [Rule 9(a) and (b), Rules Governing Section 2254 Cases in United States District Court], the answer shall set forth such contentions with particularity.

2. A memorandum brief of law in support of all issues raised in the answer, citing relevant Fifth Circuit authority and *referring to the pertinent page numbers* in the state court record in support of the answer. **A COPY OF THE BRIEF FILED IN STATE COURT *WILL NOT* BE DEEMED SUFFICIENT IN THIS PROCEEDING.**

IT IS FURTHER ORDERED that petitioner is allowed twenty (20) days following the filing of respondent's memorandum in which to file any response he wishes to present to this Court.

IT IS FURTHER ORDERED that the District Attorney file with the Court within thirty (30) days after the date of service:

1. A certified copy of the state court record, including transcripts of all proceedings held in the state courts;

2. All documents, including all briefs or memoranda of any party, filed in connection with any appeal or application for post-conviction relief presented to any and all state, district or appellate courts; and

3. Copies of all state court dispositions, including the Louisiana Supreme Court decision pertaining to the conviction under attack.

The pages of the records shall be arranged in chronological sequence, securely bound together and numbered consecutively (handwritten numbers are acceptable).

An index describing each item of the records sent and showing each item's page number shall also be attached.

In the event the District Attorney is unable to produce any of the above documents, he shall advise this Court in writing why he is unable to produce them.

After the record is complete and all legal delays have run, the Court will determine the necessity of an evidentiary hearing. If no hearing is necessary, a Report and Recommendation will be made without further notice.

IT IS FURTHER ORDERED that, as a condition to their acceptance by the Clerk, all future filings by petitioner or respondents shall include a certificate indicating that a copy thereof has been furnished to the other parties.

THUS DONE AND SIGNED in chambers, in Shreveport, Louisiana, this the 18th day of December, 1991.

/s/ Roy S. Payne
~~ROBERT H. SHEMWELL~~
UNITED STATES
MAGISTRATE JUDGE

COPY SENT
DATE 12-19-91
BY cm
TO Trest
Warden
Atty Gen
Dist Atty

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
SHREVEPORT DIVISION

(Title Omitted)

ANSWER TO APPLICATION FOR WRIT OF HABEAS CORPUS

(Filed Jan. 9, 1992)

NOW INTO COURT through the undersigned District Attorney comes and appears the State of Louisiana and in response to the petitioner's application for writ of habeas corpus, respectfully answers as follows:

1.

From a review of the record, it does appear to the State of Louisiana that petitioner does not have any State remedies at this time, and therefore the State admits that petitioner has exhausted all State remedies, including any post conviction relief available to him under Louisiana Law.

2.

The State shows that petitioner's incarceration is constitutional and that the State multiple offender proceedings against petitioner meets due process standards as required by the Fourteenth Amendment of the United States Constitution.

3.

The State therefore specifically denies defendant's complaint of denial of due process regarding the State multiple offender proceedings and the nine allegations of errors, listed on Page 3 of his memorandum in support of his application for writ of habeas corpus.

4.

The State attaches hereto a memorandum of law in opposition to this application for writ of habeas corpus, along with supporting documents as required in this Honorable Court's memorandum order of December 18, 1991.

WHEREFORE, the State of Louisiana prays that this answer, supporting memorandum and attachments be deemed good and sufficient and in compliance with the Court's memorandum order of December 18, 1991; further prays that after due consideration, this Honorable Court dismiss petitioner's application for writ of habeas corpus for a lack of merit.

Respectfully submitted,

/s/ James M. Bullers
JAMES M. BULLERS
DISTRICT ATTORNEY
P.O. BOX 69
BENTON, LA 71006

BAR NO. 3643

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
SHREVEPORT DIVISION

(Title Omitted)

MEMORANDUM OF LAW IN OPPOSITION TO PETITIONER'S APPLICATION FOR WRIT OF HABEAS CORPUS

(Filed Jan. 9, 1992)

MAY IT PLEASE THE COURT:

Richard Franklin Trest was charged in the 26th Judicial District Court for Bossier Parish, Louisiana with the offense of Armed Robbery. This prosecution was instituted by a Grand Jury Indictment dated January 5, 1979. The offense itself occurred on or about December 26, 1978. After extensive pretrial motions, the defendant was tried on the merits beginning on or about March 26, 1979, and was found guilty as charged by the trial jury on or about March 29, 1979.

On April 19, 1979, which was prior to sentencing, the prosecuting attorney filed an habitual offender bill of information, alleging that the defendant had been previously convicted of a felony in 1976 in the State of Mississippi. Defendant appeared in open court on the habitual information bill on April 24, 1979, and through counsel waived formal arraignment and entered a plea of not guilty. A hearing was held on the habitual offender bill on June 8, 1979, and defendant was found to be a multiple felony offender under the provisions of LRS 15:529.1. The defendant was then sentenced to 35 years at hard

labor without benefit of probation, parole or suspension of sentence as required by LRS 14:64.

1.

ARGUMENT AS TO DEFENDANT'S FIRST CLAIM

At the hearing on the habitual information bill held on June 8, 1979, the defense attorney called the prosecutor to the stand concerning plea discussions prior to the trial of the primary charge of armed robbery. The prosecutor testified that if the defendant plead [sic] guilty *as charged*, that he would not be prosecuted as a multiple offender, but that if he elected to go to trial and lost he would be prosecuted as a multiple offender. The defense argued to the trial court that this was unconstitutional tactics by the prosecutor, but the court rejected this argument. The State prosecutor in his argument cited *Warden Kurper vs. Hays*, 98 S.Ct. 663 (1970). (See Transcript of Multiple Offender Evidentiary Hearing beginning at Page 5 and continuing through the Court's ruling at the top of Page 8.)

Petitioner in the present proceedings cites *Hayes vs. Cowan*, 547 F.2d 42 (5th Cir. 1976). The State shows that *Hayes vs. Cowan* presented a different factual situation. There the prosecutor increased the charges to a more serious offense ostensively [sic] because of the defendant's refusal to plead guilty. In the instant case the defendant was prosecuted under the existing indictment and the prosecutor acted within constitutional due process standards in advising the defendant's counsel that defendant had the choice of pleading guilty as charged without facing the enhanced penalty provisions of LRS

15:529.1 or going to trial and risking the possibility of an enhanced penalty if he was found guilty.

Prosecutors should be and are given reasonable flexibility in the plea negotiation process. In this case the defendant was prosecuted under the existing indictment and the prosecutor clearly acted within constitutional limits in advising defense counsel of the defendant's choices. The prosecutor's actions did not violate defendant's Fourteenth Amendment Due Process rights and this claim is therefore without merit.

2.

ARGUMENT AS TO DEFENDANT'S CLAIM NO. 2, 3 & 4

Defendant's claims 2, 3 & 4 allege procedural errors by the court and the State believes that these claims can be combined for the purposes of argument. Constitutional due process under the Fourteenth Amendment recognizes that the issue of whether a defendant is an habitual criminal is essentially independent of the determination of guilt or innocence with respect to the underlying substantive offense. As long as the State provides the alleged habitual criminal with reasonable notice and an opportunity to be heard, Constitutional due process requirements have been satisfied. Louisiana has enacted LRS 15:529.1, which contains provisions under subsection D thereof for the procedure to be followed for habitual offender proceedings.

The Louisiana trial court complied with the applicable provisions of LRS 15:529.1 in that the defendant was given notice by the State filing a formal bill of information, alleging that the defendant was a multiple felony

offender, with the bill also setting out the details of his prior felony convictions. The defendant was thereafter called before the court to answer to this bill of information, at which time the defendant waived arraignment and through counsel entered a plea of not guilty to the habitual offender bill. Thereafter a hearing was held and evidence presented from which the court was able to determine that the defendant was in fact a second felony offender.

The procedure employed by the court in the instant case meets Fourteenth Amendment due process requirements and complies with the procedural requirements of the State of Louisiana.

The record clearly shows that the defendant was present at arraignment on the bill with his attorney, that through his attorney he entered a plea of not guilty, thus in fact denying the allegations. A hearing was subsequently held wherein defendant was again represented by his attorney and where the defendant had a full opportunity to be heard on all matters and to controvert the allegations as he and his counsel saw fit.

Furthermore, Louisiana Code of Criminal Procedure, Articles 551, 552 and 553, contemplate exactly the plea procedure that transpired in the instant case. The defendant plead [sic] in court in person and with the assistant [sic] of his counsel, entered a plea of not guilty. There is no requirement either in Louisiana Law or under due process requirements that the defendant himself has to utter his plea or denial.

The claims the petitioner set out in numbers 2, 3 and 4 are totally without merit for the reasons set forth above.

3.

ARGUMENT AS TO DEFENDANT'S CLAIM NO. 5

Defendant next complains that the trial court had a duty to advise him not to incriminate himself as to his prior felony convictions and failed to do so. Since defendant did not testify at the habitual offender hearing, he is obviously referring to his testimony given at the armed robbery trial. He further complains that the trial judge knew that a multiple offender charge was forthcoming against petitioner, even though this was impossible since it was strictly up to the District Attorney and not the trial judge to file a multiple offender bill.

The defendant also cites *State vs. Gibson*, 572 So.2d 666 (La.App. 5th Cir. 1990) as authority that the trial judge erred. *State vs. Gibson* dealt strictly with the defendant's testimony at his multiple offender hearing. In the instant case, defendant remained silent at his multiple offender hearing and was represented at all stages herein by a competent counsel.

The State also fails to see how the *Boykin* decision applies here since the defendant exercised his right to contest both the primary charge and the habitual offender bill with the assistance of counsel. Apparently at the armed robbery trial the defendant decided to take the stand to try and convince the jury that he was guilty of only the lessor [sic] charge of simple robbery. This certainly was trial strategy that the defendant, with the assistance of his counsel, decided upon in an effort to avoid being found guilty of armed robbery. The Fourteenth Amendment does not require that a State defendant be informed of habitual criminal charges prior to his

conviction on a primary charge. See *Wessling vs. Bennett*, 410 F.2d 205 (C.A. Iowa 1969), Cert. Denied 90 S.Ct. 384; *Stewart vs. Cunningham*, 550 A.2d 96.

At the defendant's trial on the primary charges of armed robbery, he was free to testify or not testify as he so chose. The trial court had no duty to, nor did the defendant have a constitutional right to, a warning prior to his trial testimony that the State of Louisiana may file an habitual offender bill in an effort to enhance the defendant's penalty if he were convicted. There is no merit to this claim of error.

4.

ARGUMENT AS TO DEFENDANT'S CLAIM NO. 6

Defendant next claims there was insufficient evidence to show whether or not his prior felony conviction ended in a pardon. The State presented sufficient evidence to establish his prior felony convictions and the State contends that if the defendant had been pardoned, the burden would have fallen on him too to make this assertion and to establish it to the satisfaction of the court. See *Foots vs. State of Louisiana*, 793 F.2d 610 (C.A. 5 1986). This claim of error also totally lacks merit.

5.

ARGUMENT AS TO DEFENDANT'S CLAIM NO. 7

Defendant alleges he was determined to be a multiple felony offender on a basis of improper evidence. The fundamental requisites of due process, when an habitual criminal statute is to be invoked, is reasonable notice and

an opportunity for a full and complete hearing, with the right to the aid of competent counsel. See *Johnson vs. State of Kansas*, 284 F.2d 344 (C.A. Kansas 1960). In the proceedings of Richard Franklin Trest, the State of Louisiana met these fundamental requisites of due process and the evidence presented at the contradictory multiple offender hearing was properly admitted by the judge and was substantially in compliance with LRS 15:529.1. This evidence included conviction records from the State of Mississippi with fingerprints. The State also presented an expert witness positively identifying the fingerprints in these conviction records to match that of the defendant. The court also considered the defendant's testimony at trial and concluded the defendant was one and the same person and was therefore a second felony offender. The procedure followed by the State of Louisiana in this case, including the evidence admitted and considered by the court, meets the due process requirements of the Fourteenth Amendment to the Constitution. There is absolutely no merit to this claim.

6.

ARGUMENT AS TO DEFENDANT'S CLAIM NO. 8 & 9

The defendant's last two claims can be combined for the purpose of argument. The Louisiana Code of Criminal Procedure, Article 894.1 sets out sentencing guidelines for the court in determining an appropriate sentence in a particular case. Article 14:64 of the Louisiana Criminal Code mandates the court to impose a sentence in armed robbery cases of not less than five (5) years nor more than 99 years, and, further, requires that the sentence be without benefit of parole, probation or suspension. Applying

these two articles, Louisiana law simply requires that the court impose a sentence between 5 and 99 years for the offense of armed robbery, and in determining the exact number of years, the trial judge should apply the provisions of Code of Criminal Procedure, Article 894.1. The record indicates a sufficient articulation by the trial court to comply with the sentence requirements of the State of Louisiana, and further that the sentence was within the range authorized by the armed robbery statute. Actually, after determining the defendant was a second felony offender, the court correctly concluded the penalty range to be from 33 years to 198 years, without benefit of parole or suspension of sentence.

The court properly followed the Louisiana law and procedure regarding the sentencing of the defendant and these claims are without merit.

CONCLUSION

The procedure followed by the State of Louisiana in this case meets constitutional due process standards as required by the Fourteenth Amendment. The defendant was represented at all times by competent counsel, sufficient notice was given by the State by filing the Habitual Offender Bill of Information and the defendant was given a full and complete hearing with the assistance of counsel. The procedure followed by the State of Louisiana also meets the requirements of LRS 15:529.1 and the sentence imposed by the court complies with the requirements of LRS 14:64 and the Louisiana Code of Criminal Procedure, Article 894.1. The petitioner in this case has therefore

shown no grounds which would entitled [sic] him to any relief herein.

Respectfully submitted,

/s/ James M. Bullers
JAMES M. BULLERS
DISTRICT ATTORNEY
P.O. BOX 69
BENTON, LA 71006

BAR NO. 3643

(Attachments Omitted)

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
SHREVEPORT DIVISION

(Title Omitted)

REPORT AND RECOMMENDATION

(Filed Feb. 2, 1994)

Currently before the court is an application for a writ of habeas corpus filed in forma pauperis by pro se petitioner, Richard Franklin Trest, pursuant to 28 U.S.C. §2254. This matter was referred to the undersigned for report and recommendation in accordance with the standing order of this court.

Petitioner challenges his 1979 conviction as a multiple offender (La.R.S. 15:529.1) and a second offender of armed robbery. He was sentenced to 35 years of incarceration without benefit of parole, probation or suspension of sentence by the 26th Judicial District Court, Bossier Parish, Louisiana. He is presently confined in the Louisiana State Penitentiary, at Angola, Louisiana ("Angola"). Named as respondent is the Warden at Angola, John P. Whitley.

Petitioner has exhausted his state court remedies by application for post-conviction relief/writ of habeas corpus in the 26th Judicial District Court, and to the Louisiana Supreme Court which both denied him relief. The petitioner contends that his incarceration is unconstitutional based on the single argument that he was denied due process in violation of the Fourteenth Amendment of the United States Constitution "in that the

entire multiple offender proceedings was unconstitutional". More specifically, the plaintiff alleges nine separate errors which he contends violated his constitutional rights:

> "(1) The Trial Court erred by not quashing the multiple offender bill of information as being vindictive by the prosecutor.
>
> "(2) The Trial Court failed to inform petitioner of the right to be tried as to the truth of the multiple offender bill of information as to a "formal hearing".
>
> "(3) The Trial Court failed to inform petitioner of the requirement to say whether the allegations within the multiple offender charge were true.
>
> "(4) The Trial Court erred by allowing defense counsel to enter the not guilty plea to said charge.
>
> "(5) The Trial Court failed to advise petitioner of the right to "remain silent" and not to incriminate himself as to prior felony conviction.
>
> "(6) There was insufficient evidence during Multiple Offender trial to show whether or not the prior felony conviction ended in a pardon.
>
> "(7) The evidence introduced by the State as to prior felony convictions was illegally entered into the evidence.
>
> "(8) The Trial Court erred by ordering said Second Offender sentence to be without parole.
>
> "(9) The Trial Court erred by not indicating the factors it had considered for imposing the sentencing in the record as required by L.S.A.-C.Cr.P. Article 894.1."

Claim No. 1

At the hearing on the habitual offender bill of information, held on June 8, 1979, the defense attorney called the prosecutor to the stand concerning plea discussions prior to the trial of the primary charge of armed robbery. The prosecutor testified that if the defendant pled guilty as charged, that he would not be prosecuted as a multiple offender, but that if he elected to go to trial and lost, he would be prosecuted as a multiple offender. See Tr. 5-8.

The defendant cites *Haves v. Cowen*, 547 F.2d 42 (5th Cir. 1976), which presents a different factual situation from the instant case. In *Hayes, supra*, the prosecutor increased the original charges to a more serious offense after the defendant's refusal to plead guilty. The facts of this case are different from those presented to the court in *Hayes*. Here, the defendant was prosecuted under an existing indictment. Defense counsel was advised that the defendant had a choice of pleading guilty as charged without facing the enhanced penalty provisions of L.R.S. 15:529.1, or going to trial and risking the possibility of an enhanced penalty if he was found guilty. This was part of a plea bargaining process, in which prosecutors have reasonable flexibility. An offer to forego pursuing a multiple offender bill is within constitutional limits. See *Bordenkircher v. Hayes*, 434 U.S. 357, 98 S.Ct. 663 (1978). Furthermore, the prosecutor need not have even made the choice until after the trial, without ever having given the defendant a choice. See La.R.S. 15:529.1. As such, the court does not find that the defendant's constitutional right to due process was violated by the actions of the prosecutor.

Claims 2, 3 and 4:[1]

In these claims, the petitioner contends that: (1) the trial court failed to inform him of his right to be tried as to the truth of the multiple offender allegations; (2) the trial court failed to inform him of the requirement to say whether the allegations were true; and (3) the trial court erred in allowing the defense counsel, rather than petitioner himself, to enter the plea.

The Constitution requires that, in sentencing procedures, a state provide an alleged habitual criminal with reasonable notice and an opportunity to be heard. See *Gardner v. Florida*, 430 U.S. 349, 358, 97 S.Ct. 1197, 1205 (1977). Louisiana has enacted R.S. 15:529.1 which contains procedures to be followed for habitual offender proceedings.

In this case, the State followed the provisions of 15:529.1 in that the defendant was given notice by the State filing a formal bill of information, alleging that the defendant was a multiple felony offender, with the bill also setting out the details of his prior felony convictions. (See State's Answer, Attachment No. 5) The defendant was thereafter called before the court to answer this bill of information, at which time the defendant waived

[1] The court fails to see any constitutional significance in the allegations in claims 2 and 3 and considers claim 4 to encompass whatever objection the plaintiff intended to make in claims 2 and 3. There are no technical, statutory, constitutional or magic words which the judge is required to recite. It is sufficient that the defendant was presented with the charges and asked to plead and then given an opportunity to refute those charges should he have chosen.

arraignment and through counsel entered a plea of not guilty to the habitual offender bill. (See State's Answer, Attachment No. 6) Thereafter a hearing was held and evidence presented from which the court was able to determine that the defendant was in fact a second felony offender. (See State's Answer, Attachment No. 7)

It is sufficient that the defendant was present at the arraignment on the bill with his attorney and that through his attorney he entered a plea of not guilty. Because he denied the allegations, a hearing was subsequently held which provided the defendant a full opportunity to be heard on all matters. There is no authority to suggest that either Louisiana law or constitutional due process requires that the defendant himself has to utter his plea or denial.

Claim No. 5:

The defendant contends that the trial judge knew that a multiple offender charge was forthcoming against the petitioner and failed to advise him not to incriminate himself as to his prior felony convictions during testimony given at the armed robbery trial.

At a habitual offender proceeding, the state must prove, among other things, that the defendant was convicted of a prior felony. See *State v. Sylvas*, 558 So.2d 1192 (La. App. 1st Cir. 1990). *Prima facie* proof of a prior felony conviction may be established by compliance with the state's statute. However, this is not the exclusive method of proving a prior felony conviction, and any other competent evidence may be used to establish such proof. See *State v. Moten*, 510 So.2d 55 *writ denied*, 514 So.2d 126.

The defendant was clearly under oath and sworn to tell the truth at his armed robbery trial. At that trial, the defendant was represented by counsel. Both the defendant and his counsel were informed by the prosecutor of potential habitual offender charges being brought if the defendant chose to go to trial. The defendant was under oath when he made the incriminating statements, not the subject of an interrogation at which he was unrepresented by counsel. The petitioner's argument is misplaced. *Boykin* assures that guilty pleas are given voluntarily. Here, the defendant pled guilty neither to armed robbery or the multiple offender bills. A guilty plea in state court is susceptible to a constitutional challenge that it was not voluntarily made if it can be shown that the defendant was not first advised of his privilege against compulsory self-incrimination, the right to trial by jury, and the right to confront his accusers. *Boykin v. Alabama*, 395 U.S. 238, 89 S.Ct. 1709, 1712 (1969). However, the Fourteenth Amendment does not require that a state defendant be informed of habitual criminal charges prior to his conviction on a primary charge. See *Westling v. Bennett*, 410 F.2d 205 (C.A. Iowa 1969), *cert denied*, 90 S.Ct. 384; *Stewart v. Cunningham*, 550 A.2d 96. As such, at the defendant's trial on the primary charges of armed robbery, he was free to testify or not to testify as he chose while the court had no duty to warn him prior to his testimony that the State of Louisiana might file a habitual offender bill. Since the statements clearly were not taken in violation of any constitutional protections, neither does their introduction as evidence of his prior convictions for purposes of the habitual offender sentencing offend the Constitution. The only due process requirements attached to the multiple

offender hearing are that the defendant be given notice and a chance to controvert the allegations and both were complied with. There was no constitutional violation involved. Furthermore, the court finds that the *Boykin* decision is totally inapplicable here since, with the assistance of counsel, the defendant exercised his rights to refute the charges both as to the primary charges and as to the habitual offender bill.

Claim No. 6:

Under Louisiana law relating to habitual offender proceedings, it is required that the prior felony conviction and the defendant's identity be proved. In this case, the state presented evidence which established defendant's prior felony convictions sufficiently to satisfy constitutional safeguards. Whether or not a prior felony conviction ended in a pardon is not upon the state to prove. Should the defendant contend he had been pardoned, the burden would have fallen on him to make this assertion and establish it to the satisfaction of the court. See *Foots v. State of Louisiana*, 793 F.2d 610 (5th Cir. 1986).

Claim No. 7:

Defendant alleges that he was determined to be a multiple felony offender on the basis of improper evidence. Fundamental requirements of due process, when a habitual criminal statute is to be invoked, are reasonable notice and an opportunity for a full and complete hearing with the right to the aid of competent counsel. See *Johnson v. State of Kansas*, 284 F.2d 344 (8th Cir. 1960). The evidence presented in this case included conviction

records from the State of Mississippi with fingerprints. The State also presented an expert witness who positively identified the fingerprints in the conviction records to match those of the defendant. The court did consider as well the defendant's testimony at his primary trial and concluded that the defendant was the same person and was therefore a second felony offender. This procedure, as dictated by the laws of the State of Louisiana, meets the due process requirements of the Fourteenth Amendment to the Constitution.

Claims No. 8 and 9:

After determining that defendant was a second felony offender, the court concluded the penalty range to be from 33 years to 198 years, without benefit of parole or suspension of sentence. In determining the exact number of years, the trial judge should apply the provisions of the Code of Criminal Procedure, Art. 894.1. Section 64 of the Louisiana Criminal Code mandates that the court impose a sentence in armed robbery cases of not less than 5 years nor more than 99 years and further requires that the sentence be without benefit of parole, probation or suspension. The sentencing guidelines for determining appropriate sentences in a particular case are set forth in Louisiana Code of Criminal Procedure, art. 894.1. The defendant argues that R.S. 15:529.1(A)(i),[2] the Multiple Offender Statute, does not prohibit parole for Second

[2] La.R.S. 15:529.1(A)(1) provides in part: "... upon conviction of a second felony offense, such person shall be eligible for parole consideration upon serving one-half of the sentence imposed."

Offenders, and, as such, the trial judge erred in prohibiting parole. The petitioner's original sentence was for Armed Robbery, R.S. 14:64, a sentence which *prohibits* parole. The judge's apparent interpretation of the laws, when applied in conjunction, gave him the *discretion* to allow for parole according to the circumstances. That the petitioner disagrees with the judge's interpretation provides no basis for federal habeas corpus relief since no question of a constitutional nature is raised. *Carrizales v. Wainwright*, 699 F.2d 1053 (1st Cir. 1983); *Jones v. Theriot*, 846 F.2d 457 (7th Cir. 1988).

The petitioner further argues that the trial court erred by not indicating the factors it had considered for imposing the sentencing in the record as required by C.Cr.P. art. 894.1. This court is also foreclosed from consideration of the alleged failure to follow the state's sentencing procedures because such failure is not a constitutional question reviewable on a federal habeas corpus petition. *Jones v. Estelle*, 622 F.2d 124, 126 (5th Cir. 1980), *cert. denied*, 449 U.S. 996, 101 S.Ct. 537 (1980).

Accordingly,

IT IS RECOMMENDED that the petition for a writ of habeas corpus be **DENIED.**

Objections

Under the provisions of 28 U.S.C. §636(b)(1)(C) and Fed.R.Civ. Proc. 72(b), parties aggrieved by this recommendation have ten (10) business days from service of this report and recommendation to file specific, written objections with the Clerk of Court. A party may respond

to another party's objections within ten (10) days after being served with a copy thereof. Counsel are directed to furnish a courtesy copy of any objections or responses to the district judge at the time of filing.

Failure to file written objections to the proposed findings and recommendations contained in this report within ten (10) business days from the date of its service, or within the time granted pursuant to Fed.R.Civ.Proc. 6(b), shall bar an aggrieved party from attacking the factual findings on appeal except upon grounds of plain error or manifest injustice. See *Thomas v. Arn*, 474 U.S. 140, 106 S.Ct. 466 (1985); *Carter v. Collins*, 918 F.2d 1198, 1203 (5th Cir. 1990).

THUS DONE AND SIGNED at Shreveport, Louisiana, on this the 2nd day of February, 1994.

/s/ Roy S. Payne
ROY S. PAYNE
UNITED STATES
MAGISTRATE JUDGE

COPY SENT
DATE 2-2-94
BY crw
TO: Trest
Bullers

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
SHREVEPORT DIVISION

(Title Omitted)

OBJECTION TO MAGISTRATE'S REPORT AND RECOMMENDATION

(Filed Feb. 13, 1994)

NOW INTO COURT COMES RICHARD FRANKLIN TREST (Petitioner herein) objecting to Magistrate Judge Payne's Report and Recommendation. Said Report and Recommendation is dated February 2, 1994, and received by Petitioner at the Lousiana State Penitentiary, Angola, Louisiana on or about February 9, 1994. Petitioner objects as follows:

1.

Petitioner's writ of habeas corpus raised nine (9) specific claims and the Report and Recommendation recommended that all nine claims be dismissed. Therefore, Petitioner will make a general objection relative to all nine (9) claims.

2.

Petitioner, (like many, who are incarcerated in the Louisiana State Penitentiary, Angola, Louisiana) is not knowledge in the science of law. Petitioner had been assisted by one of Angola's Writ Writers. Claim 7 in the writ is based upon two parts, titled A and B. The Report

and Recommendation did not address section B of claim 7. A review of the writ(s) that were raised in State and Federal Court; unskilled and obscurely raised in subsection B of Claim 7 is a substantial violation that warrants review by this court. In essence, Petitioner has raised the issue that his prior conviction in the State of Mississippi was judicial [sic] deficient in that the prior guilty plea was unconstitutional, because it did not comply with constitutional safe-guards.

3.

Petitioner is currently incarcerated in the Louisiana State Penitentiary, Angola, Louisiana. Petitioner was charged by Bill of Information for Armed Robbery, a violation of LSA-R.S. 14:64. After the conclusion of trial, Petitioner was found guilt [sic]. The State of Louisiana then filed a Multiple Offender Bill of Information under the provisions of LSA-R.S. 15:529.1 charging Petitioner as a Second Offender. Petitioner was subsequently convicted and sentenced to an enchancement [sic] term of thirty-five (35) years without benefit of parole, probation, or suspension of sentence due to Petitioner's prior guilty plea in the State of Mississippi. Petitioner asserted this claim in section B of Claim 7 in his post conviction/writ of habeas corpus in the State Court(s), and maintained the exact posture in this court. The claim resting in muddy waters is nevertheless well preserved. However, the Magistrate Judge's Report and Recommendation failed to address this claim. Petitioner objects and moves for review of this claim.

4.

The State of Louisiana denied Petitioner due process of law when failing to comply with the standards announced in *State v. Santiago,* La. 416 So. 2d 524 that a guilty plea in a Louisiana State Court subsequent to December 8, 1971 (date of *State ex rel. Jackson v. Henderson,* 260 La. 90, 255 So. 2d 85 (1971) became final) may not be used to enhance punishment in a habitual offender proceedings unless the record affirmatively discloses that the plea was constitutionally valid. *State v. Holden,* 375 So. 2d 1372 (La. 1979).

The State Court(s) failed to hold an evidentiary hearing on this claim.

5.

On May 24, 1976 in the State of Mississippi, Country [sic] of Jackson, Pascagoula, Mississippi in the Circuit Court of Jackson County, Mississippi with the Honorable Darwin M. Maples, Presiding Judge appeared three teen-age defendants ages 17 and 18 by the name of St. Clair Locke, Richard Trest, and Tommy Bryant. Each defendant was represented by counsels.

The three teen-age defendants entered guilty pleas and the court subsequently imposed sentence.

The guilty plea entered by Richard Trest is constitutionally deficient in that the plea does not conform to *Boykin v. Alabama,* 395 U.S. 238, 89 S.Ct. 1709.

The Court failed to advise Petitioner that:

1. By pleading guilty, he waived his rights to trial by jury, privilege against compulsory self-incrimination, and his right to confront accusers. See Page 5 of the Mississippi Boykin transcript attached. The record indicates that the court advised the two codefendants, but did not petitioner to these basic rights.

The United States Supreme Court held in *McCarthy v. United States*, 89 S.Ct. 1166 (1969) that a defendant who waives these basic rights, it must be an intentional relinquishment or an abansoment [sic] of a known right or privilege. *Johnson v. Zerbst*, 304 U.S. 458, 464, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938). Consequently, if a defendant's guilty plea is not equally voluntary and knowing, it has been obtained in violation of due process and is therefore void. Moreover, because a guilty plea is an admission of all the elements of a formal criminal charge, it cannot be truly voluntary unless the defendant posses [sic] an understanding of the law in relation to the facts.

2. The court failed to inquire if the plea was voluntarily coecered, [sic] or as a results [sic] of threats and intimidation.

3. The court failed to advise that if Petitioner elected to be tried by jury and found guilty that he would have a right to appeal. And, if he couldn't afford an attorney, one would be appointed.

4. The court failed to advise Petitioner of the minimum and maximum sentence. See the following excerpt given by the court:

BY THE COURT

I could give some of you up to ten or thirty or forty years in the penitentiary; this is the type of crime you have committed. It's very serious. (See Miss. Boykin Tr. p. 8 attached).

In *Fortia v. United*, 456 F. 2d 194 (1972), the Court held that the records did not show that *Fortia* was informed of the maximum possible sentences that could be imposed. A guilty plea is invalid as not being understanding entered if a defendant does not know the maximum penalty possible for the offense. *United States ex rel. Hill v. United States*, 5th Cir. 1971, 452 F. 2d 664, *United States v. Perwo*, 5 Cir. 1970, 433 F. 2d 1301.

The Louisiana Supreme Court set the standards in *State v. McGinnis*, La. 413 So. 2d 1307 as to non-Louisiana and federal pleas of guilty. On rehearing this court held that the records failed to show that the defendant was ever informed of his privilege against self-incrimination in the prior conviction which was later used for enhancement purpose in a Louisiana Multiple Offender hearing. The court reversed and remanded.

5. Court gave contradictory instructions as to the charges pending against Petitioner and Tommy Bryant. See the following excerpt:

BY THE COURT

All right, Trest and Bryant, you have been indicted on four charges, and the other defendant, Locke, you have been indicted on me. Do you understand that? (Miss. Boykin Tr. page 2, Lines 6-9)

BY THE COURT

Now, the other two defendants, you are charged with burglary and larcency [sic] on five offenses. Do you understand that, Bryant? Trest? (Miss. Boykin Tr. p. 6, Lines 15-17).

The Court had explained to St. Clair Locke that he was charged with one count. See (Miss Boykin Tr. pp. 2 & 6).

In *Banks v. McGougan*, 717 F. 2d 186 (1983) the court held at p. 190-191 that it is necessary, however that the record show that the plea was intelligently and voluntarily made citing *McChesney v. Henderson*, 484 F. 2d 1101, 1106 (5th Cir. 1973), cert. denied, 414 U.S. 1146, 94 S.Ct. 901, 39 L.Ed. 2d 102 (1974).

6. The Court failed to informed [sic] Petitioner of the essential elements of the crime even tho [sic] the court requested a recitation of the facts of each offense.

The constitution requires that the accused be informed of the elements of the crime charged. *Henderson v. Morgan*, 426 U.S. 637, 96 2253, 49 L.Ed. 2d 108 (1976).

In *Boykin v. Alabama*, supra the court held that a guilty plea is not valid unless it is an intelligent and voluntary choice on the part of the accused. The *Boykin* decision explains that a guilty plea constitutes a conviction without a trial; for that reasons, [sic] a defendant should be made aware of the rights that are automatically waived by choice to forego trial; the privilege against compulsory self-incrimination; the right to trial by jury; and the right to confront one's accusers. As interpreted by the La. S.Ct., the *Boykins* decision requires *"an express and knowing waiver of at least these three federal constitutional rights". State ex rel Jackson v. Henderson*, supra.

The decision to plea guilty is not deemed an intelligent and understanding choice unless the defendant is informed of the rights which attach at trial. While an understanding of the triad of rights may be the sine qua non for the acceptance of a guilty plea, it is also true that other factors may have a bearing on the validity of the plea. A mere recitation of rights does not always insure the intelligent and voluntary nature of the plea. For evidentiary purposes, the record must contain an affirmative showing that demonstrates the understanding and voluntary nature of the plea. *State v. Halsell*, 403 So. 2d 688 (La. 1981).

For the reasons cited herein this Court is respectfully requested to consider section B of Claim 7. The issues presented herein are not new, the claim was properly raised and preserved throughout the course of the post conviction/writ of habeas corpus application – the essential facts were raised unskillfully and obsured, [sic] but nevertheless raised and preserved.

WHEREFORE a review and disposition is warranted. Petitioner submits that he is entitled to relief.

Respectfully submitted,

/s/ Richard F. Trest
Richard Franklin Trest
D.O.C. #91171
Pine #4
La. State Penitentiary
Angola, Louisiana 70712

(Attachments Omitted)

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
SHREVEPORT DIVISION

(Title Omitted)

JUDGEMENT

(Filed May 16, 1994)

For the reasons stated in the Report and Recommendation of the Magistrate Judge previously filed herein, having thoroughly reviewed the record, including the written objections filed, and concurring with the Magistrate Judge's findings under the applicable law;

IT IS ORDERED that petitioner's application for a writ of habeas corpus is **DENIED**.

THUS DONE AND SIGNED at Shreveport, Louisiana, this the 13th day of May, 1994.

/s/ Tom Stagg
TOM STAGG,
UNITED STATES
DISTRICT JUDGE

UNITED STATES COURT OF APPEALS
for the Fifth Circuit

No. 94-40515

RICHARD F. TREST,

Petitioner-Appellant,

VERSUS

JOHN P. WHITLEY, Warden, Louisiana State Penitentiary,

Respondent-Appellee.

Appeal from the United States District Court
for the Western District of Louisiana

(Filed May 15, 1995)

ORDER:

IT IS ORDERED that the Federal Public Defender, Western District of Louisiana is appointed counsel to represent the above captioned Appellant, to prepare supplemental briefs, and to present oral argument.

/s/ John M. Duhe Jr.
JOHN M. DUHE JR.
UNITED STATES
CIRCUIT JUDGE

UNITED STATES COURT OF APPEALS

FIFTH CIRCUIT
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May 18, 1995

Ms. Rebecca L. Hudsmith
Federal Public Defender
102 Versailles, Ste. 320
Lafayette, La 70501

No. 94-40515 Richard F. Trest v. John P. Whitley

Dear Ms. Hudsmith:

The Court has determined that counsel should be appointed to represent the appellant in this cause and has entered the enclosed order appointing you.

In accordance with FRAP and Local Rules 31, appellant's supplemental brief should be filed within 40 days from this date. Appellee's brief is due for filing 30 days after service of your brief upon them.

For your use in preparing and filing a supplemental brief, the one volume record on appeal is enclosed and a set of the briefs on file. You may retain the briefs for your personal files but we ask that the record be returned to this office at the time your brief is forwarded for filing.

The Court does direct that the supplemental briefs address the *Curtis* issue. ___ U.S. ___, 114 S. Ct. 1732, 128 L. Ed. 2d 517 (1994).

After completion of the supplemental briefing schedule, the case will be assigned to the oral argument calendar.

Very truly yours,

CHARLES R. FULBRUGE III, Clerk

By /s/ Joan Perkins
Joan Perkins
Case Manager

JP:lmc
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UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-40515

RICHARD F. TREST

Petitioner-Appellant,

versus

JOHN P. WHITLEY, Warden,
Louisiana State Penitentiary

Respondent-Appellee.

Appeal from the United States District Court
for the Western District of Louisiana

(Filed Sept. 17, 1994)

Before JONES, STEWART, and PARKER, Circuit Judges.

EDITH H. JONES, Circuit Judge:

Appellant Richard F. Trest ("Trest") appeals the district court's denial of his petition for a writ of habeas corpus. Because his petition raises forfeited claims that are procedurally barred from review by this court, the judgment of the district court is AFFIRMED.

FACTUAL BACKGROUND

After a jury trial, Trest was convicted in 1979 of armed robbery in Bossier Parish, Louisiana. Three years before this conviction Trest had pleaded guilty to five felony counts of burglary in Mississippi. The Mississippi state court sentenced Trest to serve concurrent four year

terms for his offenses, and he was released from prison in Mississippi in 1978. Based on these prior felony convictions for burglary in Mississippi, the Louisiana trial court adjudicated Trest an habitual offender and sentenced him to 35 years imprisonment, without possibility of parole, probation, or suspended sentence. *See* La. R.S. 15:529.1. Trest concedes that during his habitual offender proceedings he failed to object to the Louisiana court's reliance on the Mississippi convictions on the basis that these convictions were somehow constitutionally invalid. Trest did not appeal his convictions in Mississippi and has never challenged their validity in any Mississippi court, either on direct or collateral appeal. Rather, he served his concurrent sentences until he became eligible for release from prison.

Trest filed his petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 on September 30, 1991. In this petition, Trest alleges for the first time that the Louisiana trial court erred in relying on his prior Mississippi convictions because these predicate convictions were unconstitutional. Specifically, Trest contends, *inter alia*, that because the Mississippi court purportedly failed to advise him of his constitutional rights and of the maximum sentence he could receive, the convictions used to enhance his Louisiana sentence were constitutionally infirm.[1] To support his petition, Trest submitted a copy of

---

[1] To buttress the claim that the Mississippi convictions are somehow unconstitutional, Trest relies on *Boykin v. Alabama*, 395 U.S. 238, 242, 89 S.Ct. 1709, 1711 (1969), in which the Supreme Court held that "[i]t was error, plain on the face of the record, for the trial judge to accept petitioner's guilty plea without an affirmative showing that it was intelligent and voluntary."

the habitual offender bill of information filed against him and the transcript of the hearing on this bill. The government did not respond specifically to this potential ground for relief in its answer to Trest's petition. Likewise, the magistrate judge's report and recommendation did not directly address the issue. Trest stressed this silence in his objections to the report and recommendation. While Trest acknowledged that his claim had been poorly articulated, he rearticulated it, and attached for the district court a copy of the transcript of his 1976 guilty pleas in Mississippi state court. After considering Trest's petition for writ of habeas corpus, the district court denied it.

DISCUSSION

When considering requests for federal habeas corpus relief, this court has frequently explained that we review the district court's factual findings for clear error, but review issues of law de novo. *See, e.g., Myers v. Johnson*, 76 F.3d 1330, 1333 (5th Cir. 1996).

In the instant case, however, this court's decision in *Sones v. Hargett*, 61 F.3d 410 (5th Cir. 1995), precludes us from reviewing the merits of Trest's habeas challenge to the constitutionality of his Mississippi convictions because his petition raises claims that were forfeited by Trest and are procedurally barred from appellate scrutiny.[2] In *Sones*, this court held that an inmate who had been sentenced under Mississippi's habitual offender

[2] Inexplicably, neither of the parties cited *Sones* or discussed it in their briefs, oral arguments, or memoranda to this court.

statute to life in prison without parole was properly denied habeas relief for his claim that his trial counsel was constitutionally ineffective because this claim would have been time barred had it been included in a state petition for habeas and, thus, was procedurally defaulted for purposes of federal habeas. *Sones*, 61 F.3d at 416.

The procedural default in *Sones* is replicated in the instant appeal. As *Sones* observes, Mississippi imposes the following procedural bar on all efforts at collateral relief from a conviction and sentence:

> A motion for relief under this chapter shall be made within three yeas after the time in which the prisoner's direct appeal is ruled upon by the Supreme Court of Mississippi or, in case no appeal is taken, within three (3) years after the time for taking an appeal from the judgment of conviction or sentence has expired, *or in case of a guilty plea, within three (3) years after entry of the judgment of conviction.*

Miss. Code Ann. § 99-39-5(2) (emphasis added); *Sones*, 61 F.3d at 417 (emphasis added); *see also, Lott v. Hargett*, 80 F.3d 161, 163 (5th Cir. 1996). In *Odom v. State*, 483 So.2d 343 (Miss. 1986), the Mississippi Supreme Court declared that this procedural bar applied prospectively to all convictions occurring prior to April 17, 1984, the statute's effective date; hence, Mississippi convictions before April 17, 1984 can be challenged collaterally only if the challenge is filed in a petition for post-conviction relief by April 17, 1987. *Sones* further explains that Mississippi's procedural bar also extends to constitutional challenges against the predicate convictions triggering habitual offender status:

> the Mississippi Supreme Court has consistently held that an attack on a facially valid prior conviction, used either as an aggravating circumstance in capital sentencing *or as a basis for a sentence as a habitual offender, must be brought after sentencing in a petition for post-conviction relief* from that prior judgment of conviction.

See Sones, 61 F.3d at 418 n.14 (emphasis added); *see also, Phillips v. State*, 421 So.2d 476 481 (Miss. 1982); *Culberson v. State*, 612 So.2d 342, 343-47 (Miss. 1992).

Because Sones did not challenge the prior convictions used to trigger the career offender enhancement in petitions for post-conviction relief filed within the three-year statute of limitations, this court considered the challenge forfeited. We reasoned that,

> [f]or the first time on appeal, *Sones's counsel argues that his prior convictions are void on their face for failing to indicate whether the guilty pleas on which they were based were knowing and voluntary. We consider this novel argument forfeited.* Although we may consider a forfeited claim if it presents a purely legal question and if failure to consider it will result in manifest injustice, the issue whether Sones's prior convictions were based on voluntary and knowing pleas is not purely a question of law. . . . Because this issue thus involves factual as well as legal questions, *we will not consider it for the first time on appeal.*

Sones, 61 F.2d at 419 n.18 (citations omitted) (emphasis added); *see also, Lott*, 80 F.3d at 164-66 (inmate in Mississippi denied federal habeas corpus review of his *Boykin* claim because Mississippi's procedural default statute is

an independent and adequate rule barring such review).[3] Indeed, the importance of enforcing Mississippi's procedural bar and of preventing the retrial of the predicate offenses used to trigger a habitual offender enhancement has been reiterated by the Mississippi Supreme Court, which has stressed that

> [i]n fulfilling its mission to determine whether a prior conviction is constitutionally valid for the purpose of enhancing a defendant's sentence, the trial court must not be placed in position of 'retrying' the prior case. Certainly any such frontal assault upon the constitutionality of a prior conviction should be conducted in the form of an entirely separate procedure solely

---

[3] Indeed, because Sones's attorney could not have raised these forfeited challenges to the prior convictions at sentencing for the enhanced conviction, this court denied Sones's habeas claim that he suffered from constitutionally ineffective counsel. As the panel explained,

> [c]ounsel therefore could not have successfully challenged the constitutionality of the prior convictions in the sentencing phase; as mentioned above, in Mississippi constitutional challenges to the validity of prior convictions that are not facially invalid must be made collaterally, and Sones has never sought collateral relief from the prior convictions that qualify him as a habitual offender. We perceive no attorney constitutional ineffectiveness. . . . Accordingly, we reject Sones's contention that denying federal review of his Sixth Amendment claim would result in a fundamental miscarriage of justice.

Sones, 61 F.3d at 420. Trest confronts precisely the same predicament as he has never challenged the prior convictions that qualify him as a habitual offender in any post-conviction or collateral proceeding in Mississippi.

> concerned with attacking that conviction. This role is neither the function nor the duty of the trial judge in a hearing to determine habitual offender status.

Phillips v. State, 421 So.2d 476, 481-82 (Miss. 1982); *Sones*, 61 F.3d at 419.

For the same reasons that Sones was procedurally barred from challenging the prior convictions used to trigger his career offender enhancement, Trest is likewise barred. As has been discussed, while Trest was convicted in 1979 for armed robbery in Louisiana, his prior convictions occurred in Mississippi. The Mississippi convictions that provided the basis for the enhancement of the Louisiana sentence arose as a result of Trest's pleas of guilty to five counts of burglary on May 24, 1976. Trest neither appealed these convictions nor challenged them collaterally. Although he was sentenced to serve concurrent four year terms of imprisonment on the five counts, he left prison when he became eligible for release, in February of 1978.

Mississippi's procedural bar, the Mississippi Supreme Court, and this court in *Sones* mandate that Trest had until April 17, 1987 to file a petition for post-conviction relief from his Mississippi convictions. Since Sones did not comply with this requirement, his challenges to the constitutionality of his Mississippi convictions have been procedurally defaulted. Put differently, because the potential remedies in Mississippi courts for the constitutional defects alleged by Sones were rendered unavailable by his own procedural default, federal courts, including those in Louisiana, are barred from reviewing these

claims. *Sones*, 61 F.3d at 416; *Lott*, 80 F.3d at 164. As the Supreme Court has instructed,

> [I]f the petitioner failed to exhaust state remedies and the court to which petitioner would be required to present his claims in order to meet the exhaustion requirement would now find the claims procedurally barred, . . . [then] there is a procedural default for purposes of federal habeas.

Coleman v. Thompson, 501 U.S. 722, 735 n.1; 111 S.Ct. 2546, 2557 n.1 (1991).

The only potential remedies available to cure Trest's procedural default are to demonstrate either cause and prejudice for the default or that a fundamental miscarriage of justice will result from our failure to analyze his claims. Again, the Supreme Court has explained that procedural default will block all federal review of a claim that a conviction was unconstitutional unless the prisoner "can demonstrate *cause for the default and actual prejudice* as a result of the alleged violation of federal law, *or* demonstrate that failure to consider the claims will result in *a fundamental miscarriage of justice.*" *Coleman*, 501 U.S. at 750, 111 S.Ct. at 2565 (emphasis added). In the instant case, Trest neither alleges such cause and prejudice nor a fundamental miscarriage of justice; indeed, Trest has not even attempted to bear this burden. Hence, a federal district court in Louisiana cannot consider Trest's claims that his Mississippi convictions were somehow unconstitutional. As a result, this court is bound to conclude as we did in *Sones:* "section 99-39-5(2) functions as an independent and adequate procedural bar to review [of the

constitutional claims raised by Trest] in federal court." *Sones*, 61 F.3d 410, 417-18; *see also, Lott*, 80 F.3d at 165.

Because this court concludes that it is foreclosed from considering the merits of Trest's habeas petition, we need not decide whether *Custis v. United States*, ___ U.S. ___, 114 S.Ct. 1732 (1994) would entitle Trest, had he not procedurally defaulted, to review in a federal habeas corpus proceeding of his claim that his prior Mississippi convictions were unconstitutional and that, as a result of this alleged constitutional infirmity, his current sentence has been improperly enhanced.

CONCLUSION

For the foregoing reasons, the judgment of the district court denying Trest's petition for federal habeas corpus relief is **AFFIRMED.**

ROBERT M. PARKER, Circuit Judge, dissenting:

The independent and adequate state ground doctrine applies to bar federal habeas corpus relief when a state court declines to address a prisoner's federal claims because the prisoner has failed to meet a state procedural requirement. *Coleman v. Thompson*, 501 U.S. 722, 729 (1991). For the independent and adequate state ground doctrine to apply, the state court adjudicating a habeas petitioner's claims must explicitly rely on a state procedural rule to dismiss the Petitioner's claims. *Sones v. Hargett* 61 F.3d 410, 416 (5th Cir. 1995). The procedural default doctrine presumes that the state court's express reliance on a procedural bar functions as an independent and adequate ground in support of the judgment. *Id.* The petitioner can rebut this presumption by establishing that the procedural rule is not strictly or regularly followed. *Id.; see also, Moore v. Roberts*, 83 F.3d 699 (5th Cir. 1996). Additionally, Petitioner might defend his position by demonstrating cause and prejudice for his failure to raise the claim in state proceedings. *See Gray v. Netherland*, 116 S.Ct. 2074, 2082 (1996). By failing to raise the procedural default as a defense, the State lost the right to assert that defense. *Id.*

In this case, the Louisiana court did not explicitly rely on the Mississippi statute of limitations, nor did the petitioner have the opportunity to rebut any resulting presumption. The majority's observation that Trest did not even attempt to bear his burden of establishing cause and prejudice is central to the flaw in their reasoning. How can this Court penalize Trest for failing to respond to the state's affirmative defense of procedural bar, when the State declined to raise such a defense?

For these reasons, I dissent from the majority's holding that petitioner was procedurally barred from challenging the prior convictions.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

(Title Omitted)

Appeal from the United States District Court
for the Western District of Louisiana

(Filed Oct. 29, 1996)

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion 09/17/96, 5 Cir., ___), ___ F.3d ___)

Before JONES, STEWART and PARKER, CIRCUIT JUDGES.

PER CURIAM:

(X) The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (FRAP and Local Rule 35) the Suggestion for Rehearing En Banc is also DENIED.

( ) The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Judges who are in regular active service not having voted in favor, (FRAP and Local Rule 35) the Suggestion for Rehearing En Banc is also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en

banc, and a majority of the judges in active service not having voted in favor, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

/s/ Edith H. Jones
United States Circuit Judge

ROBERT M. PARKER, Circuit Judge, Dissenting

No. 96-7901

(5)

In The

Supreme Court of the United States

October Term, 1996

RICHARD F. TREST,

Petitioner,

vs.

BURL CAIN, WARDEN,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

BRIEF FOR PETITIONER

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QUESTION PRESENTED

Whether, despite the State's failure to raise the affirmative defense of procedural default at any stage in the federal habeas corpus proceedings, the court of appeals is required to raise the defense *sua sponte* and is foreclosed from reviewing the claim on the merits based upon its conclusion that the claim is procedurally defaulted?

PARTIES TO PROCEEDINGS BELOW

Richard F. Trest, Petitioner

John Whitley, Warden, Angola State Prison

Burl Cain, Warden, Angola State Prison

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The court of appeals' decision is reported at 94 F.3d 1005, and is reproduced in the Joint Appendix (JA) at 88. The district court's unpublished judgment is reproduced at JA 84. The Louisiana Supreme Court's denial of review (580 So.2d 374) and the Louisiana district court's unpublished decision are reproduced at JA 24 and 27.

JURISDICTION

The court of appeals entered judgment on September 17, 1996 (94 F.3d 1005), and denied rehearing and rehearing *en banc* on October 29, 1996 (102 F.3d 552). JA at 99. The petition for a writ of certiorari was filed on January 27, 1997, and was granted in part on May 27, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 2241(c)(3) provides that a writ of habeas corpus shall not extend to a prisoner unless "[h]e is in custody in violation of the Constitution or laws or treaties of the United States; . . . "

STATEMENT OF THE CASE

The Court's grant of certiorari was limited to the first question presented in the petition: whether, despite the

State's failure to raise the affirmative defense of procedural default at any stage in the federal habeas corpus proceedings, the court of appeals is required to raise the defense *sua sponte* and is foreclosed from reviewing the claim on the merits based upon its conclusion that the claim is procedurally defaulted.

A. State Trial Court Proceedings

In 1979, Petitioner, Richard F. Trest, was convicted of armed robbery in a Louisiana state court. Record at 25. Based upon his prior convictions in Mississippi state court, Petitioner was sentenced in Louisiana as a multiple offender to 35 years imprisonment without benefit of parole. Record at 25, 53, 55.

The Mississippi state court convictions that served as a predicate for Petitioner's enhanced Louisiana sentence arose from his 1976 plea of guilty to five counts of burglary. Record at 159, 171, 172. Petitioner was 18 years old at the time. Record at 159. Petitioner was sentenced to serve concurrent four year terms of imprisonment on the five counts and was released from prison in Mississippi in 1978. Record at 125. He did not appeal his Mississippi convictions or concurrent sentences, nor did he challenge the convictions in state post conviction proceedings in Mississippi.

B. State Post Conviction and Federal District Court Proceedings

On January 17, 1990, Petitioner, appearing *pro se*, filed a petition for post conviction relief (styled a "Motion

To Correct Illegal Sentence") in the Louisiana state court where he had been sentenced as a multiple offender. JA 3. Petitioner alleged in paragraph 7(B) of the Memorandum of Law in support of the petition that the trial court erred in using the prior Mississippi convictions to enhance his Louisiana sentence since at the time of his guilty pleas in Mississippi he had not been informed of his right to appeal or his right to counsel for appeal as guaranteed by the Sixth Amendment. JA 19. Petitioner also alleged that if the Mississippi felony convictions were "infirm by all of his constitutional rights being unknown to him or offered to him by the Mississippi court," then the Louisiana constitution prohibits their use for enhancement purposes. JA 20. The State did not file an answer to the petition.

On March 26, 1990, the trial court denied post conviction relief, concluding that Petitioner raised no substantive issues regarding the multiple offender proceedings and that "[h]is attack on the technical aspect of the proceedings lack merit." JA 24. The trial court did not specifically address Petitioner's claim that the Mississippi convictions were constitutionally infirm and could not be used to enhance the Louisiana sentence, nor did the trial court state, or even suggest, that it was relying on any procedural default on the part of Petitioner with regard to this or any other claim. On May 17, 1991, the Louisiana Supreme Court denied without opinion Petitioner's application for a supervisory writ or a writ of review from the decision of the trial court denying post conviction relief. JA 27.

On September 30, 1991, Petitioner, appearing *pro se*, filed a petition for a writ of habeas corpus in the United

States District Court for the Western District of Louisiana challenging the constitutionality of his Louisiana enhanced sentence on the bases alleged in his state post conviction petition. JA 28. In its Answer, the State did not specifically respond to the claim regarding the use of the Mississippi convictions, but did acknowledge that Petitioner had exhausted all of his claims. JA 56. *See also* State's Cert. Opp. at p. 2 ("The State of Louisiana shows that it believed petitioner had exhausted State remedies at the time he filed his Federal Habeas Corpus proceedings in the U.S. District Court, Shreveport, Division."). The State did not assert any state procedural bar to Petitioner's claims.

On February 2, 1994, the magistrate judge issued a Report and Recommendation that the petition for writ of habeas corpus be denied on the merits. JA 67. The Report and Recommendation did not specifically address Petitioner's claim concerning the use of the Mississippi convictions to enhance his Louisiana sentence. JA 73-74. The magistrate judge concluded with respect to the issue of exhaustion that "Petitioner has exhausted his state court remedies by application for post-conviction relief/writ of habeas corpus in the 26th Judicial District Court, and to the Louisiana Supreme Court which both denied him relief." JA 67.

On February 18, 1994, Petitioner filed an Objection to Magistrate's Report and Recommendation, noting that the Report failed to address the claim concerning the use of the Mississippi convictions to enhance his Louisiana sentence. JA 77. Petitioner further explained that the Mississippi convictions were constitutionally infirm in light of the trial court's failure properly to inform him, prior to

his guilty plea, of the constitutional rights he was waiving as well as the maximum sentence he could receive, in violation of *Boykin v. Alabama*, 395 U.S. 238 (1969). JA 79. Petitioner attached a copy of the transcript of his guilty plea in Mississippi state court. Record at 182-222.

On May 13, 1994, the district court denied the petition for a writ of habeas corpus for the reasons stated in the Report and Recommendation. JA 84. A timely notice of appeal was filed on May 26, 1994. Record at 231. On May 15, 1995, after the Petitioner, proceeding *pro se*, and the State had filed briefs, the court of appeals appointed counsel for the Petitioner for the purpose of filing a supplemental brief and for oral argument. JA 85. Further, by letter, the court ordered the parties to submit supplemental briefs specifically addressing the issue of *Custis v. United States*, U.S., 114 S.Ct. 1731 (1994). JA 86.

C. The Decision Below

1. The Procedural Default Invoked *Sua Sponte* by the Court of Appeals

On appeal from the denial of habeas corpus relief, the parties briefed the merits of Petitioner's claims. The parties' briefs did not address procedural default, which had, theretofore, not been a part of the case. Oral argument was held on December 7, 1995; no mention of procedural default was made by the parties or the panel members.

On September 17, 1996, a majority of a panel of the United States Court of Appeals for the Fifth Circuit

injected procedural default *sua sponte*, and without notice, into the case. On the basis of default, the panel affirmed the district court's denial of federal habeas corpus relief to Petitioner without reaching the merits of Petitioner's claim. *Trest v. Whitley*, 94 F.3d 1005 (5th Cir. 1996) (Jones and Stewart, J.J.) (Parker, J., dissenting). JA 88.

The majority concluded that it was precluded from reviewing the Petitioner's claim, which it described as a challenge to the constitutionality of his Mississippi convictions, because his petition raised claims that were "forfeited" and were "procedurally barred from appellate scrutiny." JA 88. Paradoxically, the majority found a procedural default based upon *Mississippi* post conviction rules and procedures, although the Petitioner was challenging a *Louisiana* enhanced sentence and was attacking his prior Mississippi convictions only insofar as they were used to enhance his *Louisiana* sentence.

Purporting to apply Mississippi law, the majority concluded that Petitioner was required to challenge the predicate Mississippi convictions in a petition for post conviction relief from the prior judgments of conviction no later than April 17, 1984, in Mississippi. JA 91. Since Petitioner failed to seek post conviction relief in Mississippi and was apparently time-barred from doing so, the majority concluded that his claim based on the unconstitutionality of the Mississippi convictions was procedurally defaulted. JA 94.

In reaching this result, the court ignored the fact that the State of Louisiana had never asserted the defense of

procedural default either in state post conviction proceedings or at any stage of the federal habeas proceedings in either the district court or the court of appeals. The majority also did not acknowledge that the Louisiana post conviction courts did not reject the claim on the basis of any alleged procedural default.

After raising procedural default *sua sponte*, the court concluded that "[t]he only potential remedies available to cure Trest's procedural default are to demonstrate either cause and prejudice for the default or that a fundamental miscarriage of justice will result from our failure to analyze his claims." JA 95. In this regard, the court criticized the Petitioner, stating:

> In the instant case, Trest neither alleges such cause and prejudice nor a fundamental miscarriage of justice; indeed, Trest has not even attempted to bear this burden. Hence, a federal district court in Louisiana cannot consider Trest's claims that his Mississippi convictions were somehow unconstitutional.

JA 95. The court failed to acknowledge, however, that Petitioner had no reason to allege cause and prejudice because procedural default had never been an issue in the case before the court's decision.

2. The Dissenting Opinion

Judge Robert M. Parker dissented, noting that "the state court adjudicating a habeas petitioner's claims must explicitly rely on a state procedural rule to dismiss the petitioner's claims." JA 97. Because the state courts in Petitioner's case did not do so, there was no procedural

bar to merits review of Petitioner's claim. JA 97. Furthermore, the dissent recognized that by failing to assert procedural default as a defense, the State waived the right to raise the defense. JA 97. The dissent reasoned further:

> In this case, the Louisiana court did not explicitly rely on the Mississippi statute of limitations, nor did the petitioner have the opportunity to rebut any resulting presumption. The majority's observation that Trest did not even attempt to bear his burden of establishing cause and prejudice is central to the flaw in their reasoning. How can this Court penalize Trest for failing to respond to the state's affirmative defense of procedural bar, when the State declined to raise such a defense?

JA 97.

SUMMARY OF ARGUMENT

In the course of over six years of litigation, the issue of procedural default was never raised by the State of Louisiana or any previous state or federal court presented with Petitioner's claim. Procedural default did not become an issue in the case until the panel majority, *sua sponte* and without prior notice, injected it into the case. The Petitioner was provided no opportunity to address the correctness of the court's conclusion that the claim was procedurally defaulted or to show cause and prejudice for the default. Under the circumstances, the majority's *sua sponte* and utterly unanticipated determination that Petitioner's claim was defaulted under Mississippi

law and that the court was foreclosed from considering it on the merits, without first giving the Petitioner prior notice and an opportunity to be heard on the issue, is fundamentally unfair. For this reason alone, the court of appeals decision must be reversed.

Furthermore, the majority erred in concluding that it was precluded from considering the merits of Petitioner's claim based upon its *sua sponte* invocation of a procedural default. This Court and the majority of courts of appeals to address the issue have concluded that procedural default is an affirmative defense that is waived by the failure of the State, as the party whose interests are at stake, to timely apprise the federal courts of the existence of the procedural default. While several courts of appeals have acknowledged that a federal court may raise *sua sponte* a procedural default not asserted by the State, no other court has concluded that merits review of a habeas claim is precluded on the basis of a waived procedural default.

The State of Louisiana never asserted the defense of procedural default and thus waived it. No Louisiana court relied on this defense in rejecting Petitioner's claim. There is thus no basis for the court of appeal's reliance on procedural default. The majority's conclusion that it was nevertheless precluded from addressing the merits of Petitioner's claim as a result of a waived procedural default that it raised *sua sponte* is contrary to the jurisprudence of this Court and the circuit courts and must be reversed.

ARGUMENT

I. THE COURT OF APPEALS ERRED IN INVOKING *SUA SPONTE* A PROCEDURAL DEFAULT AND REJECTING PETITIONER'S CLAIM ON THAT BASIS WITHOUT FIRST GIVING HIM NOTICE AND AN OPPORTUNITY TO ADDRESS THE ISSUE

The issue of procedural default was never raised by the State of Louisiana or by any state or federal court until the court of appeals issued its opinion in this case. To the contrary, the parties litigated and the courts addressed Petitioner's claims on the merits. Nevertheless, the majority concluded that it was precluded from addressing the merits of Petitioner's claim based upon its *sua sponte* invocation of a procedural default and its determination that Petitioner had failed to establish cause and prejudice for the default. It did so without even acknowledging that Petitioner had no reason to allege or attempt to demonstrate cause and prejudice before the court's opinion issued.[1] The majority's conclusion, reached without first giving Petitioner any notice of its consideration of the issue or any opportunity to be heard, is fundamentally unfair and must be reversed.

Fundamental fairness demands that a federal court provide a habeas petitioner with notice and an opportunity to be heard on the issue of procedural default raised for the first time by the federal court *sua sponte*

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[1] As the dissent queried: "[h]ow can this Court penalize Trest for failing to respond to the state's affirmative defense of procedural bar, when the State declined to raise such a defense?" JA 97.

before adverse judicial action is taken. In *Esslinger v. Davis*, 44 F.3d 1515, 1528 (11th Cir. 1995), the Eleventh Circuit concluded that it is "fundamentally unfair for a court sua sponte to invoke a procedural default without giving the petitioner an opportunity to show cause for the default." In that case, the magistrate judge and the district court effectively "sandbagged" the petitioner by lulling him into believing that a procedural default would not be interposed as a bar to relief by first raising and then dropping the matter prior to an evidentiary hearing. *Id.* The court concluded that under the circumstances, and given the State's continuing waiver of the default, "basic fairness" required the magistrate judge to inform the petitioner prior to an evidentiary hearing of his intention to consider the default as a bar to relief. *Id.* *See also* *Washington v. James*, 996 F.2d 1442, 1444, 1447 (2nd Cir. 1993), *cert. denied*, 114 S.Ct. 895 (1994) (court of appeals, after raising procedural default defense *sua sponte*, found "no indication in the record of cause" for the petitioner's failure to raise his claim in state court and reversed on the basis of procedural default, rather than addressing the merits; significantly, however, court requested supplemental briefs from both parties on the issue of procedural default before reaching its decision); *Hardiman v. Reynolds*, 971 F.2d 500, 505 (10th Cir. 1992) (the court must give the petitioner an opportunity to respond to a defense of state procedural default raised *sua sponte* prior to a dismissal on that basis); *Burgin v. Broglin*, 900 F.2d 990, 995-996 (7th Cir. 1990) (based on counsel's admission at oral argument that petitioner was aware of evidence in support of his claim during the pendency of his state appeal, court denied claim on basis of procedural default

that was not raised by the State or addressed by the district court).

The court below gave the petitioner no notice of its consideration of procedural default. The Petitioner, not unreasonably, made no attempt to address a procedural default that he did not know existed until after the court had ruled against him. Like the petitioner in *Esslinger*, the Petitioner in the present case was effectively "sand-bagged" by the Court of Appeals.

In addition to offending notions of fundamental fairness and basic due process, the Court of Appeals' approach to the resolution of the issue of procedural default is at odds with the fact-based nature of the cause and prejudice inquiry. *Jenkins v. Anderson*, 447 U.S. 231, 234 n. 1 (1980). *See also Lambrix v. Singletary*, 117 S.Ct. 1517, 1523 (1997). The factual findings underpining a cause and prejudice determination should be made in the first instance by the district court. The Court of Appeals' cursory review of the record on appeal – a record that is devoid of any reference to procedural default – cannot substitute for the factual analysis the cause and prejudice inquiry demands.

The majority's conclusion that the Petitioner did not demonstrate the absence of a procedural bar or cause and prejudice for his default – when he had no reason for doing so based on the State's inaction and no notice of the need to make such a showing by the court of appeals – is contrary to the teaching of this Court regarding the nature of that showing and is fundamentally unfair. On this basis alone, the court of appeals' decision must be reversed.

II. THE COURT OF APPEALS WAS NOT REQUIRED TO RAISE *SUA SPONTE* PROCEDURAL DEFAULT AND, THUS, ERRED IN CONCLUDING THAT IT WAS FORECLOSED FROM ADDRESSING THE MERITS OF PETITIONER'S CLAIM ON THAT BASIS

A. Procedural Default Is An Affirmative Defense That Is Waived By The State's Failure To Assert It

This Court has consistently characterized procedural default as an affirmative defense and has placed the burden on the State, whose interests are at stake, to timely apprise the federal courts of the existence of the procedural default or see it waived. *See, e.g., Gray v. Netherland*, 116 S.Ct. 2074, 2082 (1996) (procedural default is "an affirmative defense for the Commonwealth;" thus, if the petitioner's claim was addressed at some stage of federal proceedings, "the Commonwealth would have been obligated to raise procedural default as a defense, or lose the right to assert the defense thereafter"); *Jenkins v. Anderson*, 447 U.S. at 234 n. 1 (1980) (in rejecting the State's procedural bar argument raised for the first time in this Court, the Court noted that "[o]rdinarily, we will not consider a claim that was not presented to the courts below," and thus did not consider the default). *See also Engle v. Isaac*, 456 U.S. 107, 124 n. 26 (1982) (*dicta*) (Court acknowledged that "[i]n some cases a State's plea of default may come too late to bar consideration of the prisoner's constitutional claim"); *Estelle v. Smith*, 451 U.S. 454, 468 n. 12 (1981) (in rejecting State's argument that the respondent waived his Fifth Amendment claim by failing to make a timely, specific objection, this Court noted that

State did not present the waiver argument in its petition for certiorari).[2] Moreover, this Court has recognized that the existence of a procedural default does not deprive the federal court of jurisdiction to decide the merits of the claim. *See Lambrix*, 117 S.Ct. at 1522.

The majority of the courts of appeals to address the issue have also concluded that procedural default is a defense that is waived by the State's failure to assert it in a timely manner. *See, e.g., Gomez v. Acevedo*, 106 F.3d 192, 196 n. 4 (7th Cir. 1996) (it is the State's obligation to assert a procedural default defense "in a manner reasonably calculated to alert the court;" otherwise, the defense is deemed waived); *Ford v. Norris*, 67 F.3d 162, 165 (8th Cir. 1995) (where the State asserted procedural default on

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[2] Placing the burden on the State as a party to federal habeas litigation to assert its own interest in a timely fashion is certainly not unusual. *See, e.g., Ford v. Georgia*, 498 U.S. 411, 420-21 n. 5 (1991) (Court notes that the State has never argued that petitioner's pretrial motion was inadequate to preserve the issue for review); *Amadeo v. Zant*, 486 U.S. 214, 228 n. 6 (1988) (failure of predecessor lawyer for State to dispute factual findings in lower federal courts constitutes a concession on the point); *City of Canton, Ohio v. Harris*, 489 U.S. 378 (1989) (State's failure to inform this Court prior to grant of certiorari review that petitioner had arguably conceded point below does not provide basis for the Court to abstain from addressing the question before it); *Beck v. Alabama*, 447 U.S. 625, 630 n. 6 (1980) (State's failure to argue at any point that petitioner's presentation of his claim was insufficient as a matter of state law to preserve the issue constitutes the state attorney general's view of its own state's law that this Court "should not simply brush aside"); *Castaneda v. Partida*, 430 U.S. 482, 485 n. 4 (1977) (state official abandoned argument that defendant's challenge was not timely raised as a matter of state procedure in his petition for certiorari).

appeal for the first time, the bar is waived); *Esslinger v. Davis*, 44 F.3d 1515, 1524 n. 32 (11th Cir. 1995) (the State can waive a procedural bar to relief by explicitly waiving, or by merely failing to assert, the bar in its answer to the habeas petition); *Wells v. Maass*, 28 F.3d 1005, 1010 (9th Cir. 1994) (state's failure to assert procedural default constitutes a waiver); *Cupit v. Whitley*, 28 F.3d 532, 535 (5th Cir. 1994), *cert. denied*, 115 S.Ct. 1128 (1995) (State waived procedural default by failing to object to petitioner's claim on that ground in its answer to the petition); *Bailey v. Cowley*, 914 F.2d 1438, 1439 (10th Cir. 1990) (although state courts refused to consider petitioner's claims on the merits because of a procedural default, State failed to raise the defense in federal court and it is thus deemed waived); *Merlo v. Bolden*, 801 F.2d 252, 255 (6th Cir. 1986), *cert. denied*, 480 U.S. 909 (1987) (when State did not expressly raise procedural default issue in state court, and state courts denied relief on the merits, the State waived the right to assert it in federal district court).

B. A Federal Court Is Neither Required To Raise A Waived Procedural Default Defense *Sua Sponte* Nor Is Precluded From Addressing The Merits Of The Claim On That Basis

In keeping with the equitable imperative to treat litigants on both sides of a lawsuit the same, the federal courts should apply a waiver of a defense as strictly against the State as they apply waiver doctrines against the habeas petitioner. *See, e.g., William v. Dixon*, 961 F.2d 448, 457 (4th Cir. 1991), *cert. denied*, 113 S.Ct. 510 (1992) ("finality, and its companion, waiver, must run along a two-way street;" thus, the State cannot raise new

defenses on appeal any more than the petitioner); *Falconer v. Lane*, 905 F.2d 1129, 1135 (7th Cir. 1990) ("waiver is not an obstacle reserved for habeas petitioners alone"). Moreover, it is inappropriate to deny relief on the basis of comity-based defenses given a State waiver. *See, e.g., Esslinger v. Davis*, 44 F.3d 1515, 1527-28 (11th Cir. 1995) ("In a given case . . . the state is in the best position to know whether, in the interest of justice, its rule needs – indeed, deserves – federal court vindication. Accordingly, when, as here, the state waives a habeas petitioner's procedural default in failing to obtain appellate review of a claim, the district court should assume that the waiver is justified."); *Barrera v. Young*, 794 F.2d 1264, 1269 (7th Cir. 1986) (if federal court refused to accept State's waiver of procedural default, whether explicit or implicit, "this would be a meddlesome intrusion into the state's internal allocation of governmental authority").

While several courts of appeals have nevertheless acknowledged that a federal court *may* raise *sua sponte* a procedural default not asserted by the State, no other court has concluded that a federal court is *required* to raise the defense *sua sponte* or that merits review of a habeas claim is precluded on the basis of a waived procedural default.[3] *See, e.g. Washington v. James*, 996 F.2d 1442, 1448 (2nd Cir. 1993), *cert. denied*, 114 S.Ct. 895 (1994) ("We believe that we may raise the procedural default

[3] Nor have any cases been found wherein a federal court, as did the court below, raised *sua sponte* a procedural default based upon the petitioner's failure to comply with the procedural rules of a state other than the state whose conviction and sentence are the subject of the habeas challenge and for which the petitioner is in custody.

issue sua sponte."); *Hardiman v. Reynolds*, 971 F.2d 500, 502 (10th Cir. 1992) ("[g]enerally, where the parties have not raised a defense, the court should not address the defense sua sponte;" however, where the doctrine implicates nonjursidictional values "that may transcend the concerns of the parties to an action, it is not inappropriate for the court, on its own motion, to invoke the doctrine"); *Hull v. Freeman*, 932 F.2d 159, 164 and n. 4 (3rd Cir. 1991) (although neither party raised issue of procedural default, "we think it appropriate for us to consider that issue sua sponte;" nevertheless, the court declined to rely on the procedural default given that it read the decision of last state court to address the claim to have denied it on the merits); *Henderson v. Thieret*, 859 F.2d 492, 498 (7th Cir. 1988), *cert. denied*, 490 U.S. 1009 (1989) (district court may raise the question of procedural default *sua sponte;* however, it may not raise and consider the issue where the state implicitly indicates a desire to waive the defense).

These courts of appeals have generally analogized to this Court's approach to a belatedly raised defense of nonexhaustion as set forth in *Granberry v. Greer*, 481 U.S. 129 (1987). In *Granberry*, the State interposed as a defense for the first time on appeal the habeas petitioner's failure to exhaust his state remedies. *Id.* at 130. This Court concluded that when the State fails, either inadvertently or otherwise, to raise an arguably meritorious nonexhaustion defense, the court of appeals "should determine whether the interests of comity and federalism will be better served by addressing the merits forthwith or by requiring a series of additional state and district court

proceedings before reviewing the merits of the petitioner's claim." *Id.* at 134. However, it is important to note that in *Granberry*, that decision's delineation of situations in which federal court deferral pending state proceedings is appropriate despite the state's waiver or forfeiture of exhaustion all involved a federal court's protection of its *own* interests. *Id.* at 134-136.

Unlike the exhaustion doctrine, however, the procedural default doctrine protects only the interests of the States and not any interests of the federal courts. *See Lambrix*, 117 S.Ct. at 1522-23; *Harris v. Reed*, 489 U.S. 255, 265 n.12 (1989); *County Court of Ulster County v. Allen*, 442 U.S. 140, 152-54 (1979). State officials are necessarily in the best position to represent and reveal the interests of the state to the federal courts. *See* 2 J. Liebman and R. Hertz, *Federal Habeas Corpus Practice And Procedure*, § 26.2a, at 817 (and cases collected therein) (2nd ed. 1994). Thus, if a state official declines to assert a procedural default, the federal court shows no disrespect for the State's interest by reaching the merits of the petitioner's claim. *Id. Accord: Ulster County Ct. v. Allen*, 442 U.S. at 154 (1979). Accordingly, a State's waiver of a procedural default removes all bases for federal court reliance on the default, and the federal court should address the merits of a petitioner's claim.

C. The Court Of Appeals Was Not Foreclosed From Addressing Petitioner's Claim On The Merits Since The State Waived Any Procedural Default Defense

The State of Louisiana, the only party represented by a lawyer throughout this litigation, has never suggested

that Petitioner's challenge to his enhanced Louisiana sentence on the basis of the unconstitutionality of the predicate Mississippi convictions was procedurally barred. Furthermore, the State has acknowledged that Petitioner exhausted all of his claims in Louisiana post conviction proceedings. JA 56. The State's failure to raise the defense of procedural default at any time renders that defense waived. Like all other litigants in all other proceedings, the State should be required to raise any available defense at the earliest possible time, and its failure to do so should be strictly enforced.

Inexplicably, the majority opinion did not acknowledge the State's failure to assert a procedural default. Instead, having found a procedural default under Mississippi law, the court simply concluded that the default precluded its review of the merits of Petitioner's claim. JA 94. The opinion thus does not address the appropriateness of raising the defense *sua sponte* – given that the defense is designed to protect the interests of the State of Louisiana – based on the State's failure to assert it. The court of appeals' total disregard for the State's failure to raise the defense of procedural default, and the impact of that failure on the availability of the defense as an impediment to a merits review of Petitioner's claim, renders the opinion below fundamentally flawed.

The State of Louisiana had multiple opportunities in the state and federal courts to identify any interest it had in avoiding a ruling on the merits of Petitioner's claim on the basis of his failure to comply with Mississippi post conviction procedure and did not do so. The State's failure to raise the defense – which it has never suggested should be excused on any basis – certainly implies that

Louisiana has no interest in applying the procedural rules of another state in order to bar a merits review of Petitioner's claim.[4] Moreover, the Louisiana courts denied the Petitioner relief without ever suggesting that Petitioner's claim was procedurally defaulted because of his failure to seek post conviction relief from his Mississippi convictions in Mississippi court. Under the circumstances, there is no basis for the court of appeals' reliance on the procedural default.

The court of appeals clearly erred in concluding that it was foreclosed from addressing Petitioner's claim on the merits because of a procedural default it injected in the case *sua sponte* despite the State's failure to raise the defense at any time. This conclusion is contrary to the opinions of this Court and the circuit courts characterizing procedural default as an affirmative defense that is waived by the State's failure to assert it and must be reversed.

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[4] Nor does the Petitioner concede that Louisiana should have any interest in applying the procedural rules of Mississippi in a habeas proceeding challenging a Louisiana enhanced sentence sufficient to raise a procedural bar to Petitioner's claim.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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In The

Supreme Court of the United States

October Term, 1996

RICHARD F. TREST,

Petitioner,

v.

BURL CAIN, WARDEN,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF FOR RESPONDENT

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QUESTION PRESENTED

Whether a federal court of appeals properly concluded that it was foreclosed from addressing the merits of a habeas claim following its *sua sponte* invocation of procedural default?

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BURL CAIN, WARDEN,

Respondent.

On Writ of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

BRIEF FOR RESPONDENT

STATEMENT OF THE CASE

Petitioner Richard Franklin Trest, an inmate at Louisiana State Penitentiary, is before this Honorable Court on a writ of certiorari to the United States Court of Appeals for the Fifth Circuit for review of his federal habeas corpus proceedings.[1] This Honorable Court's grant of certiorari was limited to the first question presented in the *Petition For Writ Of Certiorari* filed by petitioner's appointed counsel Rebecca Hudsmith. *See also* Appendix A at 5a (hereinafter App. at ___).

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[1] Burl Cain has replaced John P. Whitley as warden for Louisiana State Penitentiary in Angola, Louisiana and is now the respondent in this litigation.

A. Procedural History In State Court

On January 5, 1979, petitioner was indicted by a grand jury for the 26th Judicial District, Parish of Bossier, State of Louisiana, for the offense of armed robbery in violation of La. R.S. 14:64 (West 1978). App. D at 20a. The charge stemmed from the December 26, 1978, armed robbery of Marvis E. Mason, an attendant at B&J Grocery, a store located in Bossier Parish, Louisiana. Record at 88, (hereinafter R. at __). Petitioner, along with an accomplice, pulled and held a gun on Mr. Mason while the accomplice took about $84.00, a wrist watch, and a "blank (starters) pistol" from the victim. R. at 81, 120-124. Petitioner was tried by a 12-person jury during a three-day trial and was found guilty as charged by an 11 to 1 vote on March 29, 1979. R. at 88. At trial, testifying in his behalf, petitioner denied he had a gun but admitted he wanted his victim to believe he was armed. R. 122. Petitioner further testified under oath that he had previously been convicted of five counts of burglary in the State of Mississippi in 1976, had served time for those crimes at Mississippi State Penitentiary, and was paroled on February 2, 1978, after serving two years. R. at 125, 130.

Following the Louisiana conviction for armed robbery, the State of Louisiana on April 19, 1979, filed a bill of information against the petitioner charging him as a second-time felony offender under La. R.S. 15:529.1 (West 1979) based upon his prior five felony convictions for burglary in the State of Mississippi. R. at 83-85. *See also* App. D at 20a-24a. Petitioner pled not guilty to the habitual offender bill and, through trial counsel S. Patrick Phillips, unsuccessfully moved to quash the bill on the basis that its filing was vindictive and violated an alleged

right to a jury trial. *Respondent's Motion To Enlarge The Record* at 30, (hereinafter, R.M. at __).

Following a contradictory hearing in which the State of Louisiana entered its evidence concerning the five prior Mississippi felony convictions, the trial court ruled on June 8, 1979, that petitioner was a habitual offender under the State of Louisiana's recidivism statute. R. at 87-114. *See also Respondent's Supplemental Motion To Enlarge The Record* and attachments included therein. On June 8, 1979, the trial court sentenced petitioner to an enhanced sentence of 35 years imprisonment at hard labor without benefit of probation, parole or suspension of sentence[2] as required by La. R.S. 14:64 (West 1978) and La. R.S. 15:529.1 (West 1979). (R. at 115-117) *See also* App. D at 20a-24a.

I. Direct Review Of Conviction And Sentence

On direct review, the Louisiana Supreme Court[3] affirmed petitioner's conviction and sentence on February

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[2] As is obvious from the record before this Honorable Court, petitioner concedes that he has attacked his Mississippi convictions only so far as their claimed unconstitutional use by the State of Louisiana for enhancing his Louisiana conviction for armed robbery. *See Brief For Petitioner* at 2. While petitioner is incarcerated in Louisiana for a period of 35 years beginning from the date of his sentencing on June 8, 1979, because of good time credits and credit for time served, his actual release date is February 19, 2000. *See R.M.* at 203.

[3] At the time of petitioner's original conviction in 1979, all criminal appeals were made directly to the Louisiana Supreme Court as a matter of the Court's original jurisdiction. Since that time, the Louisiana Constitution has been amended. Today the same appeal would first be presented to the Louisiana Court of Appeal, Second Circuit, with only discretionary review by the Louisiana Supreme Court under its powers of supervisory review. *See* La.C.Cr.P. art. 912.1, as amended by Acts 1980 of the Louisiana Legislature, No.

6, 1980, by summarily denying relief. R.M. at 000-029. The Louisiana Supreme Court denied a February 21, 1980, request for rehearing on March 3, 1980. R. 82. No further review of this judgment was sought.

B. State Post Conviction Relief Proceedings

On February 26, 1981, petitioner, acting *pro se*, filed in state court a petition for writ of habeas corpus[4] wherein he asserted claims related to an allegedly unconstitutional shifting of the burden of proof contained in both a particular jury charge and the prosecutor's closing argument at trial. R. M. at 94-97. The trial court denied this writ application on March 2, 1981. R.M. at

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516, § 1, eff. July 1, 1982, following approval of amendments to La. Const. Art. 5, § § 5, 8 and 10, which were subsequently approved by Acts 1980, No. 843, § 2. *See* App. C at 8a-9a. In Trest's state post conviction relief application filed in state court on January 17, 1990, (the third page) and in his federal habeas application filed in the Western District of Louisiana on September 30, 1991, petitioner maintained that he did not know if he had appealed his conviction and sentence on direct review in Louisiana. Joint Appendix at 29, (hereinafter J.A. at __), and *Petitioner's Motion To Enlarge The Record* at heading No. 3 moving that petitioner's *Motion To Correct Illegal Sentence* filed in state court on January 17, 1990, be filed into the record (hereinafter, P.M. at __). However, in a previous state post conviction relief application filed on October 21, 1983, as discussed *infra*, petitioner knew he had appealed. R.M. at 49. The record now before this Honorable Court indicates that Trest did, in fact, appeal his conviction and sentence, both of which were summarily affirmed by the Louisiana Supreme Court on February 6, 1980, with a request for rehearing denied on March 3, 1980.

[4] Effective January 1, 1981, the State of Louisiana adopted its current scheme dealing with collateral attacks on state convictions with the mandatory use of the Uniform Application For Post Conviction Relief. *See* La.C.Cr.P. art. 924 *et seq.*, App. C at 10a-19a. Such a state habeas proceeding is now commonly referred to as an application for post conviction relief.

97. The trial court judgment became final because the record does not indicate that petitioner sought supervisory review from the Louisiana Supreme Court.

On October 21, 1983, petitioner filed a second *pro se* application for post conviction relief entitled *Application For Writ Of Habeas Corpus* asserting claims related to ineffective assistance of counsel, other crimes evidence and for a second time, a claim relating to the unconstitutional shifting of the burden of proof of a particular jury charge. R.M. at 32-115. These claims were the only claims included in the Uniform Application For Post Conviction Relief. However, in petitioner's supporting memorandum, Trest argued three additional claims for relief relating to the testimony of a witness he claimed had violated the order of sequestration, excessive sentence and patent error.

The State responded by filing its *Answer To Motion For Post Conviction Relief*. R.M. at 35-38. The trial court denied relief on April 18, 1984 and denied petitioner's May 7, 1984, application for a rehearing. R.M. 32-34, 117-119. Petitioner then filed a *Petition For Writ Of Mandamus Or, In The Alternative A Writ Of Prohibition* on September 6, 1994 with the Louisiana Supreme Court, which denied supervisory review on April 1, 1985. R.M. at 101-144, 31. The record does not demonstrate that petitioner sought any further review of the denial of this application.

On January 17, 1990, petitioner filed a third *pro se* application for post conviction relief entitled *Motion To Correct Illegal Sentence*. *See* J.A. at 3-23[5]. In the

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[5] As discussed in Footnote No. 3 *supra*, J.A. refers to the Joint Appendix.

Uniform Application For Post Conviction Relief,[6] petitioner's only claim was that "[t]he entire multiple offender proceedings were in violation of LSA-R.S. 15:529.1." Attached thereto was his memorandum in support of the application. The memorandum detailed nine claims for relief. In claim No. 7, petitioner complains that "[t]he evidence introduced by the state as to prior felony convictions was illegally entered into evidence." In further briefing this claim, the petitioner added two subparts: A and B. In claim 7A, petitioner argued in his brief that the documents used by the State of Louisiana at his habitual offender hearing to prove his prior Mississippi convictions were not certified, and therefore, could not be used to enhance his Louisiana conviction. J.A. at 18. *See also* R.M. at 162.

The substance of his 7B claim was that his Louisiana enhanced sentence was somehow invalid because, at the time of his guilty pleas in Mississippi, he was not informed by the trial judge of an alleged right to appeal or of an alleged right to counsel on appeal, and was not informed of the maximum sentence which could be imposed.[7] J.A. at 19-20. *See also* R.M. at 162-163. The "7B claim" is one of the two claims now before this Honorable Court that petitioner argues to this Court that the Fifth Circuit should have addressed on the merits. J.A. at 10. *See also Brief For Petitioner* at 3, 6 and 9.

The January 17, 1990, application for post conviction relief was denied by the trial court on March

[6] This application for state post conviction relief is the first step in the procedural chain that resulted in this Honorable Court's granting the instant petition for writ of certiorari.

[7] Hereinafter, for the sake of simplicity, these alleged issues for relief raised by petitioner in subpart B of his claim No. 7 will be summarily referred to as the "7B claim."

26, 1990. J.A. at 24-26. The record contains no answer by the State of Louisiana to this petition.[8] On July 13, 1990, petitioner filed an application for *Writ Of Supervisory And/Or Review* of the trial court's denial of his *Motion To Correct Illegal Sentence* with the Louisiana Supreme Court. R. M. at 145, 169. Attached to the application was the identical post conviction relief application and accompanying memorandum which had been submitted to the trial court. R.M. at 146-169. On May 17, 1991, the Louisiana Supreme Court summarily denied review. J.A. at 27, R.M. at 145.

Petitioner then filed a fourth *pro se* application for state post conviction relief entitled *Petition For Writ Of Habeas Corpus* on November 7, 1994. In this application, petitioner, a white male, for the first time challenged the grand jury system in Louisiana claiming

[8] Petitioner correctly notes that the State of Louisiana did not respond to the original state application for post conviction relief filed on January 17, 1990, his third such state court filing. *See Brief For Petitioner* at 3. Under Louisiana law, which was also in effect at the time of Trest's January 17, 1990, post conviction relief application, a trial court will order a district attorney to respond to a state post conviction relief application if, by viewing the petition on its face, the petition establishes a basis for relief, which if established, would entitle the prisoner to relief. In this case, the silent record suggests that the trial judge summarily denied relief without ordering the District Attorney to either make procedural objections or to address the petition on the merits. *See* La.C.Cr.P. art. 927. *See also* App. C at 12a-13a. Further, one could argue that had the District Attorney been ordered to answer, he or she may have successfully argued that the merits of the petition should be procedurally defaulted in that Trest's application was repetitive, and further review would be possibly barred for inexcusably failing to brief the claims earlier. *See* La. C.C.P. art. 930.4. *See also* App. C at 16a-17a. In a subsequent state post conviction filing on November 7, 1994, and discussed *infra*, the District Attorney does lodge a procedural objection on the basis of La.C.Cr.P. art. 930.8. R.M. at 189. *See* App. C at 18a-19a.

that the process of selecting a state grand jury foreman in the 26th Judicial District, Parish of Bossier, State of Louisiana, was racially biased against blacks. Trest claimed that the selection process violated his equal protection rights and that his trial lawyer's performance was ineffective for failing to challenge the discriminatory nature of this selection process. R.M. at 171-184. Following an answer filed by the District Attorney as well as a state *Supplemental Response To Petition Writ Habeas Corpus* filed on November 1, 1994, the trial court denied relief on November 17, 1994. R.M. at 185-189. Petitioner then responded with a *Traverse In Opposition To The State's Reponse* filed on November 18, 1994, which the trial court denied by referencing its earlier reasons for denial of November 17, 1994. R.M. at 190-192.

Petitioner then filed an application for *Writ Of Review* and a supporting brief with the Louisiana Supreme Court on December 29, 1994, wherein he argued the same claims for relief. R.M. at 193-201. The Court summarily denied review on November 15, 1996. R.M. at 170. The record does not indicate that petitioner pursued this application any further.

C. **Federal Habeas Corpus Proceedings**

On September 30, 1991, petitioner filed *pro se* a *Petition Under 28 U.S.C. § 2254 For A Writ Of Habeas Corpus By A Person In State Custody* with the United States District Court, Western District of Louisiana, Shreveport Division. J.A. at 28-36. This petition and supporting memorandum were the identical nine claims for relief alleged in petitioner's *Motion To Correct Illegal Sentence* and supporting memorandum filed in state court on January 17, 1990, upon which relief was denied by the trial court on March 26, 1990, and by the Louisiana

Supreme Court on May 17, 1991. J.A. 24-27. (*Compare* J.A. 28 through 36 to J.A. 3 through 23).

In his federal petition, Trest again raised his No. 7 claim that "the evidence introduced by the state as to prior felony convictions was illegally entered into evidence." J.A. at 37-51. In his memorandum, Trest raised in federal district court the same claim No. 7 and argued the same basis for the "7B claim" as he had argued in state court, to wit: that he was not informed of his alleged right to appeal his guilty pleas, his alleged right to counsel on that appeal and the maximum sentence that could be imposed.

On January 9, 1992, the State of Louisiana responded by filing its *Answer To Application For Writ Of Habeas Corpus* and *Memorandum Of Law In Opposition To Petitioner's Application For Writ Of Habeas Corpus* and attachments. J.A. at 56--67, R. at 68-77, 78-143.[9] On behalf of the State of Louisiana, the District Attorney informs the federal court that petitioner "has exhausted all State remedies, including any post conviction relief available to him under Louisiana law."[10] J.A. at 56. On the merits of the nine claims, but not specifically addressing "the 7B claim", the State of Louisiana contended that petitioner's habitual offender proceedings

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[9] On January 24, 1992, Trest filed a *Motion In Traverse To Respondent's Answer To Writ Of Habeas Corpus*. R. at 145-146.

[10] The District Attorney is presumably responding that Trest had exhausted his state court remedies under Louisiana law in that the nine claims for relief contained in the federal habeas filed on January 17, 1990, were identical to the nine claims of relief presented and denied on March 26, 1990, by the state trial court in a post conviction relief application to which the Louisiana Supreme Court had declined supervisory review on May 17, 1991. Compare J.A. at 9-10 against J.A. at 38-39 and P.M. at subheading 3, *Motion To Correct Illegal Sentence*, attached memorandum of law, page 3.

in Louisiana complied with the minimum due process requirements guaranteed by the Fifth and 14th Amendments to the United States Constitution.

After describing the constitutional requirements of the habitual criminal statute, the federal magistrate concluded in his report that petitioner had exhausted his state court remedies, and that the procedure followed by the State of Louisiana met the due process requirements of the 14th Amendment. J.A. at 67-76, R. at 148-157. The federal magistrate's Report And Recommendation did not address the merits of the "7B claim" raised by Trest in his memorandum to the federal court.

After issuing the Report And Recommendation, the federal magistrate notified the parties that they had ten business days from service of the Report And Recommendation to file specific, written objections with the Clerk of Court for the Western District. J.A. at 75-76, R. 157.

On February 18, 1994,[11] petitioner filed *Objections To Magistrate's Report And Recommendation*. J.A. at 77-83, R. at 199-205. In his objections, petitioner discusses that the federal magistrate had not addressed his previously raised "7B claim". Moreover, Trest expanded his "7B claim" to include an attack on his Mississippi convictions under *Boykin v. Alabama*, 395 U.S. 238 (1969), alleging for the first time that his prior Mississippi guilty pleas were not intelligently and voluntarily made.[12]

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[11] The Joint Appendix indicates that petitioner's objections were filed on February 13, 1994; however, the record indicates that they were filed on February 18, 1994. Compare J.A. at 77 against R. at 223. In light of the fact that the joint appendix is compiled from the record, the correct date would be February 18, 1994.

[12] Hereinafter, as was done in Footnote No. 6, *supra*, for the sake of simplicity, this newly raised claim will be collectively referred to as the *Boykin* claim.

Trest attempted to sweep his new *Boykin* claim in under the pretext that he had previously raised the matter as part of his "7B claim" saying that his claim had been "unskilled and obscurely raised in subsection B of claim 7" and that the magistrate's report had "failed to address this claim." J.A. at 78. In further expanding his newly raised *Boykin* claim, petitioner argues that the Mississippi trial court failed to advise Trest that "by pleading guilty, he waived his rights to trial by jury, privilege against compulsory self-incrimination, and his right to confront accusers." J.A. at 80. Trest further complained for the first time that "[t]he record indicates that the court advised the two codefendants, but did not (sic) petitioner to these basic rights." J.A. at 80. Up to this point, and as noted *supra* at 7, Trest's "7B claim" dealt solely with the alleged failure by the Mississippi trial judge to advise Trest at the time of his guilty pleas of his alleged right to appeal, his alleged right to counsel on that appeal, and the maximum sentence that could be imposed.[13] In support of

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[13] Petitioner argues to this Honorable Court that his claim concerning the apparently constitutional deficiency in the Mississippi convictions was presented to the state court in Trest's post conviction relief application filed on January 17, 1990, was again presented in the federal habeas petition Trest filed on September 30, 1991, and was again discussed in Trest's objections to the federal magistrate's Report And Recommendation. Petitioner's position is obviously that there was only one claim. *See Brief For Petitioner* at 3-5. The State of Louisiana contends herein that there were actually two claims: the "7B claim" regarding the alleged failure to inform Trest of his alleged right to appeal and alleged right to counsel on that appeal and the *Boykin* claim, which was raised for the first time in Trest's objections to the magistrate's report in that the guilty pleas were not intelligently and voluntarily made. This factual dispute will apparently be a point of contention between the parties in oral argument before this Honorable Court. As *Mele v. Fitchburg District Court*, 850 F. 2d 817, 822 (1 Cir. 1988) demonstrates, there is no "duty to look for a

his newly raised *Boykin* claim, for the first time Trest attached to his objections to the magistrate's report a copy of the plea colloquy from his guilty pleas in *State of Mississippi v. St. Clair Locke, Richard Trest and Tommy Bryant*, Docket Nos. 7841-7845, Circuit Court, April 1976 Term, Jackson County, State of Mississippi, May 24, 1976. R. at 148, 206-222. In his objections, Trest cited to the transcript arguing that the transcript supported his claim that the Mississippi judge had violated his constitutional rights under *Boykin*. In anticipation of a possible challenge that he was attempting to enter new evidence by attaching the transcript, Trest wrote "...The issues presented herein are not new, the claim was properly raised and preserved throughout the course of the post conviction/writ of habeas corpus application - the essential facts were raised unskillfully and obscured, [sic] but nevertheless raised and preserved." J.A. at 83. The District Attorney did not respond to the petitioner's objections.[14]

On May 13, 1994, United States District Judge Tom Stagg issued an order, adopting the federal magistrate's Report And Recommendation, which had denied the petitioner federal habeas relief. R. at 230, J.A. at 84. Without any comment, the Court's order summarily mentions the existence of the petitioner's objections to the magistrate's report, but does not address the objections in any detail. As noted previously, the

needle in a paper haystack." *See also Petrucelli v. Coombe*, 735 F. 2d 684, 689 (2d Cir. 1984), which observed that "federal judges will not presume that state judges are clairvoyant."

[14] On July 7, 1997, the 26th Judicial District Attorney James M. Bullers for the Parish of Bossier, State of Louisiana, requested in writing that the Attorney General for the State of Louisiana, Department of Justice, take over the perfection of the State's response to this Honorable Court. *See* R.M. at 204.

magistrate's Report And Recommendation as adopted by the district court did not address the "7B claim" and obviously was issued prior to petitioner's raising his *Boykin* claim. J.A. at 67-76, 84.

Petitioner filed a *Notice Of Intent To Appeal* on May 26, 1994. R. at 231. Attached thereto was petitioner's application to the United States District Court for a Certificate Of Probable Cause to appeal to the Fifth Circuit for the United States Court of Appeals, and a *Request For A Certificate Of Probable Cause*. R. at 232-233. The district court denied the Certificate Of Probable Cause on June 20, 1994. R. at 234.

Subsequently, on August 16, 1994, petitioner filed *pro se* in the Fifth Circuit for the United States Courts of Appeal an *Appeal Brief Prepared On Behalf Of Richard F. Trest*. R.M. at 205-222. Despite the district court's denial of a Certificate of Probable Cause, the Fifth Circuit construed Trest's notice of intent to appeal as a motion for a Certificate of Probable Cause, and granted the certificate on September 22, 1994.

In his *pro se* appeal brief to the Fifth Circuit, Trest assigned as error all previously raised claims Nos. 1 through 9 that had been presented to the state and lower federal court including Claim No. 7 asking "Whether the court erred allowing (sic) the uncertified Mississippi documents in evidence?" R.M. at 206. In his briefing of Claim No. 7 to the Fifth Circuit, Trest, again as he had done in the state and lower federal court, addressed the "7B claim" in his memorandum and reiterated his claim regarding the failure to be informed by the Mississippi trial judge of his alleged right to appeal, his alleged right to counsel on that appeal and the maximum sentence that could be imposed at the time he entered his Mississippi guilty pleas in 1976. R.M. 219-220.

The District Attorney responded in the Fifth Circuit by filing on November 2, 1994, its *Memorandum In Opposition To Appellant's Appeal From U.S. District Court, Western District Of Louisiana*. R.M. at 223-224. Rather than briefing the matter anew, the District Attorney simply referred the Fifth Circuit to the State's response in federal district court in a two-page response which incorporated the State's previous answer filed with the district court on January 9, 1992. The Fifth Circuit thereafter appointed Federal Public Defender Rebecca Hudsmith as counsel for Trest on May 18, 1995, and ordered supplemental briefing on the issue concerning collateral attacks of prior convictions raised by *Custis v. United States*, 511 U.S. 485 (1994). R.M. at 202, 205-224. Thereafter, both the State of Louisiana and the petitioner submitted supplemental briefs on the merits of *Custis* at it related to the newly raised *Boykin* claim. R.M. 225-252. Oral argument was held before the Fifth Circuit on December 7, 1995. *Brief For Petitioner* at 4.

On September 17, 1996, the Fifth Circuit issued its opinion in *Trest v. Whitley*, 94 F. 3d 1005 (5th Cir. 1996), *sua sponte* invoking procedural default and summarily denying petitioner's habeas application in affirmation of the district court's ruling. In so doing, the Fifth Circuit relied upon its previous decision in *Sones v. Hargett*, 61 F. 3d 410 (5th Cir. 1995), and held it was precluded from reviewing the merits of Trest's habeas claims regarding the constitutional attack on his Mississippi convictions because his petition raised claims that were procedurally barred from federal scrutiny. *Id.* at 1008, J.A. at 90.

On behalf of the petitioner, Ms. Hudsmith on October 1, 1996, requested a rehearing by simultaneously filing a *Petition For Panel Rehearing On Behalf Of The Appellant Richard F. Trest* and *Petition For Rehearing En Banc On Behalf Of The Appellant Richard F. Trest* with attachments, both of which were denied on October 29, 1996. R.M. at 283-303, 254-282, J.A. at 99.

On January 27, 1997, counsel for petitioner applied to this Honorable Court for petition for a writ of certiorari, which was granted for the limited purpose of addressing the first question raised in the petition. App. A at 5a-6a.

SUMMARY OF THE ARGUMENT

1. Based upon the record before it, the Fifth Circuit's *sua sponte* invocation of the procedural bar was correct.

Granberry v. Greer, 481 U.S. 129 (1978), clearly recognized the authority of a federal court to raise a procedural bar despite the State's failure to raise that defense. The *Granberry* Court stressed the necessity of allowing discretion and flexibility to lower courts in determining the advisability of raising a procedural bar or foregoing such a defense in favor of addressing the merits of a claim.

2. The Fifth Circuit, in its discretion, undertook to recognize the Mississippi law in question as an independent and adequate state rule, which once raised, prevented examination of the merits of petitioner's claims. Furthermore, the Court found that petitioner neither alleged cause and prejudice nor a fundamental miscarriage of justice, and therefore, the Court concluded that it was foreclosed from considering the merits of *Trest's* habeas challenge. This decision is consistent with this Honorable Court's procedural default doctrine.

ARGUMENT

I. **The federal court of appeals' *sua sponte* invocation of a Mississippi procedural bar was not an abuse of discretion.**

A. The Fifth Circuit's *sua sponte* invocation of procedural default is consistent with principles announced in *Granberry v. Greer*, 481 U.S. 129 (1987).

The *sua sponte* invocation of procedural default was proper in this case because it served the interests of comity[15] and federalism[16]. Although the Fifth Circuit

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[15] "The doctrine of comity arises from the nature of our federal system, the joinder of sovereign states into a single union. Mutual respect among sovereigns for the legislative, executive, or judicial acts of each other constitutes the heart of the doctrine. Considerations of finality, avoiding piecemeal litigation, and preventing disruption of custody also support comity." *McGee v. Estelle*, 722 F. 2d 1206, 1210 (5th Cir. 1984)(citations omitted). *McGee* further recognized that a federal court may either accept or reject a state's waiver of exhaustion or notice *sua sponte* the lack of exhaustion. *Id.* at 1214. Further, in *Thompson v. Wainwright*, 714 F. 2d 1495 (11th Cir. 1983) *cert. denied*, 466 U.S. 962 (1984), that Court, recognizing that interests of comity underlie the exhaustion doctrine and that a district court has discretion on whether to recognize a waiver finding "[c]omity is not a one way street...Strong federal interests may exist that, balanced against those of the state in the particular case, will permit the district court in its discretion to decline a waiver and require state exhaustion. An unconditional right of waiver would increase the burden on the federal system." *Id.* at 1509. ***But see*** newly enacted Antiterrorism and Effective Death Penalty Act of 1996, discussed *infra* at 30.

[16] Justice Blackmun, dissenting in *Coleman v. Thompson*, 501 U.S. 722, 759 (1991) wrote that "[f]ederalism secures to citizens the liberties that derive from the diffusion of sovereign power."

clearly was not "required" to *sua sponte* invoke procedural default as the petitioner suggests, such invocation in this case was clearly not an abuse of discretion. The situation herein implicated both the law of Louisiana and Mississippi, two distinct interests the Fifth Circuit had the authority to consider. At the time the District Attorney for the State of Louisiana replied that petitioner had exhausted his state court remedies regarding his claims in federal court, clearly the District Attorney was referring to the "Statement Of The Claims" listed as No. 1 through No. 9 of the federal habeas application that was identical to the "Statement Of The Claims" that was included in the previously rejected state application for post conviction relief. Compare J.A. at 9-10 to J.A. at 38-39. Notably, the District Atttorney briefed the claims as listed by petitioner as No. 1 through No. 9, and did not address any additional bases for relief that petitioner may have inserted in the encompassing memoranda of law. J.A. at 58-66.

Likewise the magistrate's Report And Recommendation again addressed only the claims listed by petitioner as No. 1 through No. 9. J.A. at 67-76. As far as either party to the Fifth Circuit litigation was concerned, the issue of a collateral attack on the Mississippi convictions, which, prior to petitioner's objections to the magistrate's report, had only been partially addressed in the petitioner's accompanying memoranda as the "7B claim", did not reach the forefront of any forum until the Fifth Circuit itself ordered that the *Custis* issue[17] be briefed. (J.A. at 9-10, 38-39, 86-87, R.M. at 202.)

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[17] *Custis, supra,* held that, unless a prior conviction had been obtained without benefit of counsel in violation of the Sixth Amendment, the due process clause is not offended by declining to allow constitutional

Heretofore, prior to the Fifth Circuit's decision, only the law of Louisiana had been at issue in any state or federal forum. Moreover, the *pro se* petitioner's attack on his Louisiana conviction based upon a collateral attack of his prior Mississippi convictions was not raised under *Boykin*[18] until he filed objections to the magistrate's report, and it was not until appellate review before the Fifth Circuit had the merits of the *Boykin* claim been briefed or orally argued by any party to the litigation. (R.M. at 225-245, 246-253.)[19]

The litigation in the instant case makes clear that the interests of two sovereign states, Louisiana and Mississippi, were implicated once the Fifth Circuit's *de*

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attacks on prior convictions at sentencing for purposes of repeat offender statutes. *See also* Smith, *More Than A Question Of Forum: The Use Of Unconstitutional Convictions To Enhance Sentences Following Custis v. United States*, 47 Stan. L.Rev. 1323, 1325, recognizing that the *Custis* holding "thus precludes most defendants facing an enhanced sentence under "Three Strikes And You're Out" statutes - or any other recidivist statute - from claiming at sentencing that their prior strikes are constitutionally infirm."

[18] In his memoranda in state and federal courts, Trest cites *Boykin* but not in relation to his Claim No. 7 that "[t]he evidence introduced by the State as to prior felony convictions was illegally entered into evidence." Trest cites *Boykin* for the proposition that his Mississippi guilty pleas were unconstitutionally infirm for the first time in his objections to the magistrate's report. Trest had previously cited *Boykin* for support of his fifth claim that "[t]he Trial Court failed to advise Petitioner of the right to 'remain silent' and not to incriminate himself as to prior felony convictions" in the context of his testifying at his trial in Louisiana. J.A. at 10, 13-17, 18-20, 39, 42-45, 47-48..

[19] Both briefs for the State and the petitioner focused on the *Boykin* claim raised for the first time in the petitioner's objections to the magistrate's report rather than the "7B claim" raised previously in the state and lower federal courts. The District Attorney never objected that the *Boykin* claim had not been fairly presented to the state or lower federal court.

novo review focused upon petitioner's collateral attack on his Mississippi guilty pleas. While the federal jurisprudence recognizes that some federal courts are not inclined to *sua sponte* invoke a procedural bar not heretofore announced by the respondent State, other federal courts recognize that there may be certain circumstances under which the *sua sponte* invocation is appropriate. The latter position is clearly consistent with this Honorable Court's holding in *Granberry*, *supra*.

Petitioner argues to this Court that because *Granberry* involved the doctrine of exhaustion and the protection of federal interests, it should not be controlling on the instant facts. *See Brief For Petitioner* at 18. However, the instant facts necessarily implicate the interest of two distinct and sovereign states, and therefore, considerations of comity arise.

In discussing the defenses of nonexhaustion and procedural default, the Tenth Circuit of the United States Court of Appeals in *Hardiman v. Reynolds*, 971 F. 2d 500, 503 n. 4 (10th Cir. 1992), relying on *Brown v. Fauver*, 819 F. 2d 395, 398 (3d Cir. 1987), stated, "[a]lthough we recognize important differences between these two defenses, the test elaborated in *Brown* [to justify *sua sponte* invocation of nonexhaustion defense] i.e., does the defense substantially implicate important values that transcend those of the parties – also applies to the state procedural bar defense. Moreover...the nonexhaustion defense, like the procedural default defense, involves considerations of comity." *Id.* This Honorable Court in *Wainwright v. Sykes,* 433 U.S. 72, 83 (1977), *overruling in part, Fay v. Noia*, 372 U.S. 391, 430 (1963), [the latter decision being subsequently abrogated by *Coleman v. Thompson,* 501 U.S. 722 (1991)] further recognized the considerations of judicial efficiency and the orderly

administration of criminal justice as supporting the procedural default doctrine.

The *Hardiman* Court added "[b]ecause these concerns substantially implicate important interests beyond those of the parties, it is not exclusively within the parties' control to decide whether such a defense should be raised or waived." *Id.* at 502. In *Smith v. Moffett*, 947 F. 2d 442, 445 (10th Cir. 1991), the Tenth Circuit held that "we have discretion to raise comity issues sua sponte." Federal appellate as well as district courts have the authority to raise a state procedural bar *sua sponte*. *See Manlove v. Tansy,* 981 F. 2d 473, 476 n. 4 (10th Cir. 1992).

When the Fifth Circuit requested that the parties address the *Custis* issue, it necessarily implicated a collateral constitutional attack on Mississippi convictions although Mississippi was not a party to the litigation. In *Presnell v. Kemp*, 835 F. 2d 1567, 1573-75 (11th Cir. 1988), *cert. denied,* 488 U.S. 1050 (1989), the 11th Circuit found that the type of state procedural rules that may foreclose habeas relief are those that require a criminal defendant to present his claims of error seasonably, so that, if meritorious, the error can be remedied efficiently and with minimal delay. These procedural rules, besides fostering finality of convictions, also deter "sandbagging," the withholding of claims in an effort to get more than "one bite of the apple." *See Wainwright v. Sykes*, 433 U.S. at 89-90.

The Fifth Circuit's jurisdiction involves the sovereign states of Louisiana, Texas and Mississippi. The doctrines of comity and federalism concern the relationship between the federal government and each independent and sovereign State. For petitioner to claim that the only interests at stake herein are those of the State

of Louisiana ignores the plain fact that the interests of the State of Mississippi are equally drawn into the fray. To find, as the petitioner suggests, that the State of Louisiana has waived procedural default flies in the face of Mississippi's interests when it is the State of Mississippi's laws that create the procedural bar upon which the Fifth Circuit relies. Even assuming *arguendo* that Louisiana has waived the defense of procedural default, the Fifth Circuit in its discretion may *sua sponte* invoke procedural default to protect the finality of the Mississippi convictions at issue herein. *Id.*

Granberry involved the defense of nonexhaustion of state remedies as opposed to the procedural default at issue in the present case. Trest's failure to exhaust his remedies in Mississippi are now moot in that the cause of action has prescribed, and he cannot now collaterally attack those convictions in Mississippi.[20] Put another way, because Trest's right to collaterally attack his Mississippi convictions has prescribed he has technically met the requirements of exhaustion. *See Gray v. Netherland*, __ U.S. __, 116 S.Ct. 2074, 2080 (1996), *citing Castille v. Peoples*, 489 U.S. 346, 351 (1989). However, for policy reasons enunciated in *Granberry*, the Fifth Circuit's *sua sponte* invocation of procedural default in this case and on the record as it appeared before that court was not an abuse of discretion.

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[20] Although the Fifth Circuit rests its holding on a procedural default in Mississippi, the State of Louisiana responds herein that given Trest's procedural history in Louisiana state courts, he would similarly be barred from seeking further relief regarding any newly claimed unconstitutionality of the Mississippi convictions. *See* La.C.Cr.P. art. 924 *et seq.*, App. C at 10a-19a. This procedural bar would clearly apply to the *Boykin* claim Trest raised for the first time in his objections to the magistrate's report.

In *Granberry* this Honorable Court recognized that federal courts have discretion to decide whether failure to exhaust state court remedies should be invoked despite the state's failure to raise that defense. This Court determined that federal appellate courts in such instances possess discretion to decide whether exhaustion is required or whether the interests of comity and federalism would be better served by addressing the claims on the merits. *Granberry*, 481 U.S. at 135. A federal court may overlook a prisoner's failure to exhaust his state court remedies, and if the habeas petition clearly demonstrates a lack of merit, "the interests of the petitioner, the warden, the state attorney general, the state courts, and the federal courts will all be well served even if the State fails to raise the exhaustion defense, the district court denies the habeas petition, and the court of appeals affirms the judgment of the district court." *Id.*, at 135. Clearly the principle behind *Granberry* is that a federal court must be allowed flexibility in handling habeas petitions. For these reasons, the Fifth Circuit's *sua sponte* invocation of procedural default should be allowed.

Further, Louisiana has relied upon the presumed validity of the Mississippi convictions.[21] Petitioner admits

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[21] *Amicus curiae* brief filed in this matter by the National Association Of Criminal Defense Lawyers in support of petitioner's position argued that petitioner had not committed procedural default because he had presented his claims regarding the constitutionality of his Mississippi convictions to Louisiana courts. *See Brief For The National Association Of Criminal Defense Lawyers As Amicus Curiae In Support Of Petitioner* at 3-8. This argument has no merit in light of the record as it now appears before this Honorable Court. While it is true that petitioner's "7B claim" was mentioned in supporting memoranda in state and federal district court, the *Boykin* claim did not surface until late in the federal litigation as objections to the magistrate's report. Therefore, no court prior to the Fifth Circuit had entertained the *Boykin* claim.

and the record demonstrates that at the time of his habitual offender proceeding in June 1979 that his counsel did not lodge a contemporaneous objection under La. C.Cr. P. art. 841. *See App.* C at 8a. Further, Trest could have, but opted not to, attack the constitutional validity of his Mississippi pleas under *Boykin* as late as his first *pro se* application for state post conviction relief in February 1981. (R.M. at 0-13, 94-97). At the time, Louisiana law provided that once the State had proven the existence of prior felony convictions beyond a reasonable doubt, including a showing that the defendant was represented by counsel, Trest had the ultimate burden of proving affirmative evidence that a federal or out-of-state conviction used to enhance a Louisiana sentence was unconstitutional. At that point, the burden shifted back to the State to affirmatively prove the plea's constitutionality for use as an enhancement. *See State v. Shelton*, 621 So. 2d 769, 771 (La. 1993), by which limited the holding of *State ex rel. Jackson v. Henderson*, 255 So. 2d 85 (La.1971) to convictions entered after December 8, 1971. *See also State ex rel. LeBlanc v. Henderson*, 259 So. 2d 557 (La. 1972). The Louisiana Supreme Court has held that a guilty plea will be considered knowingly and voluntarily made as required by *Boykin* only if accused made an articulated waiver of the three essential rights - right to a jury trial, right to confront witnesses, and right against self-incrimination as determined by the entire record.[22] The essence of the petitioner's *Boykin* claim

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[22] In petitioning this Honorable Court for a writ of certiorari, Ms. Hudsmith cited an excerpt from the Mississippi plea colloquy showing an obvious typographical error. *See Petition For A Writ Of Certiorari* at 8. While the entire transcript was admitted into the Fifth Circuit record at the time petitioner objected to the magistrate's report, it had never been presented to a Louisiana court. *LeBlanc* recognized that Louisiana courts should make a determination of a valid *Boykin* waiver

herein that was not raised until objections were filed to the magistrate's report belatedly attacks the Mississippi convictions on this basis.

To reach the merits of his claims, petitioner argues that procedural default is an affirmative defense which the State of Louisiana waived by not expressly invoking it, and therefore, the Fifth Circuit should have addressed Trest's claims concerning his prior Mississippi convictions used to enhance his Louisiana sentence. *Brief For Petitioner* at 18-19. The State of Louisiana clearly informed the federal district court that exhaustion of state court remedies was not at issue, given, at the time of the response, the identical *pro se* petition for federal relief had been previously filed *pro se* in state court, and that the state district court had addressed the merits of the "Statement Of The Claims" No. 1 through No. 9, in which relief was summarily denied by the Louisiana Supreme Court. It is equally clear that at no time did the State of Louisiana object on the basis of procedural default by invoking the law of Mississippi pursuant to 28 U.S.C. § 2254 (b).[23]

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on the entire record "because the requirement of a simultaneous verbatim entry of the colloquy would allow 'the unfortunate lapse of a court report [to defeat] the conviction, irrespective of how well the judge handles the guilty plea." *Shelton*, 621 So. 2d at 772, *citing LeBlanc*, 259 So. 2d at 560. A Louisiana court obviously reviewing this matter in the first instance would only determine the validity of an out-of-state plea limited to its use for enhancement purposes only.

[23] The State of Louisiana fails to understand petitioner's assumption that the State of Louisiana was required by 28 U.S.C. § 2254 (b)(prior to the recent amendment) to inform the federal district court that petitioner had not exhausted his Mississippi court remedies, which requires that a state prisoner in custody pursuant to a state judgment shall not be entitled to federal habeas relief unless he "has exhausted the remedies available in the courts of the State..." *See United States ex rel. Avila v. Ahitow*, 791 F. Supp. 197, 199 (N.D. Ill. 1992), *citing*

B. *Sua sponte* invocation of procedural bars is best decided on a case-by-case basis.

Assuming *arguendo*, that the State of Louisiana implicitly waived any and all procedural bars, *Granberry, supra*, as well as other lower federal decisions clearly support allowing such *sua sponte* invocation based upon a case-by-case basis. *See Davis v. Campbell*, 608 F. 2d 317, 320 (8th Cir. 1979)(even though state by error did not argue nonexhaustion, federal court of appeals could *sua sponte* invoke doctrine out of state-federal comity interests); *U.S. ex rel. Isaac v. Franzen*, 531 F. Supp.

Smith v. Digmon, 434 U.S. 332 (1978), for the proposition that proper exhaustion requires that the prisoner "'fairly present' the issue to the highest court of the state that possesses the power to review the question. The State of Louisiana has no authority to invalidate a Mississippi conviction in the first instance. At the time of Trest's habitual offender hearing under La. R.S. 15:529.1 (West 1979), the State was required to prove beyond a reasonable doubt that a valid out-of-state felony conviction existed, to which a presumption of regularity and validity attached. The burden then shifted to Trest to rebut that presumption by proving its invalidity by a preponderance of the evidence. In this case, Trest's counsel did not lodge a contemporaneous objection at the time of the habitual offender proceeding, and the issue was not raised in state post conviction relief until Trest filed his third such application on January 17, 1990. Meanwhile, Trest's cause of action to attack his prior Mississippi convictions in Mississippi prescribed in 1987. *See also Neyland v. Blackburn*, 785 F. 2d 1283, 1293 (5th Cir. 1986), *cert. denied*, 479 U.S. 930 (1986), *citing State of Louisiana v. Bernard*, 366 So. 2d 1294, 1299 (La. 1978)(recognizing that state prisoner's federal habeas claim that his prior Texas guilty plea was unconstitutionally infirm for enhancement purposes is rejected where Louisiana demonstrates evidence to support a finding that out-of-state guilty plea was made with benefit of counsel, was voluntary and prisoner was aware of the consequences of the plea).

1086, 1089 (N.D. Ill. 1982)(federal court had independent duty to ensure compliance with exhaustion requirement); and *Smith v. Horn*, __ F. 3d.___(3d Cir. 1997), 1997 WL 412087 at 6 (recognizing federal court of appeal may *sua sponte* raise procedural default). *See also Ortiz v. Dubois*, 19 F. 3d 708, 714 (1 Cir. 1994), *cert. denied*, 513 U.S. 1085 (1995); *Brewer v. Marshall*, 119 F. 3d 993 (1 Cir. 1997)(recognizing district court in federal habeas proceeding may consider procedural default *sua sponte*); *Washington v. James*, 996 F. 2d 1442 (2d Cir. 1993), *cert. denied*, 510 U.S. 1078 (1994); *Hull v. Freeman*, 932 F. 2d 159, 164 n. 4 (3d Cir. 1991), *overruled on other grounds*, *Caswell v. Ryan*, 953 F. 2d 853 (3d Cir. 1992), *cert. denied*, 504 U.S. 944 (1992); *Odom v. Boone*, 62 F. 3d 327, 332 (10th Cir. 1995)(failure of respondents in habeas corpus to raise procedural bar did not preclude court of appeals from raising it *sua sponte*); and *Hardiman, supra*, 971 F. 2d at 502-04 and n. 4.

While admittedly the Fifth Circuit's opinion is silent as to the *Granberry* analysis, its holdling clearly rests on giving respect to Mississippi law. Moreover, *Granberry* makes clears that the Fifth Circuit obviously *was not required* to invoke the bar on its own motion; however, because the Court chose to do so does not mean that on these facts, the Court's *sua sponte* invocation was improper.

Petitioner's argument to this Court for a constitutionally required "waive it or lose it" approach implies that only the State of Louisiana's interests are at stake. As argued *supra* a federal court is required to protect the interests of all States, not just one in particular. Louisiana may arguably have no interest in protecting the procedural rules of the State of Mississippi, but a federal court should and does have such an interest. *Brief For Petitioner* at 20. *See also Bannister v. Delo*, 100 F. 3d 610, 622 (8th Cir. 1996), *cert. denied*, __ U.S.__, 117 S.Ct. 2526 (1997), wherein the Eighth Circuit *sua sponte* invoked the nonretroactivity issue under *Teague v. Lane*, 489 U.S. 288 (1989) even though the State did not raise it. The Eighth Circuit further recognized a need not to accept the state's waiver of exhaustion in certain circumstances. *See Victor v. Hopkins*, 90 F. 3d 276, 278 (8th Cir. 1996), *cert. denied*, __ U.S. __, 117 S.Ct. 1091 (1997) and *Duvall v. Purkett*, 15 F. 3d 745, 747 n. 4 (8th Cir. 1994), *cert. denied*, 512 U.S. 1241 (1994)("[t]he purpose of exhaustion is not to create a procedural hurdle on the path to federal habeas corpus, but to channel claims into an appropriate forum, where meritorious claims may be vindicated and unfounded litigation obviated before resort to a federal court").

Citing *Gray v. Netherland*, __ U.S. __, 116 S.Ct. 2074 (1996), *Jenkins v. Anderson*, 447 U.S. 231 (1980), *Engle v. Isaac*, 456 U.S. 107 (1982) and *Estelle v. Smith*, 451 U.S. 454 (1981), petitioner argues that the Fifth Circuit's *sua sponte* invocation of procedural default and refusal to address the merits despite the State of Louisiana's express waiver "...is contrary to the opinions of this Court and the circuit courts characterizing procedural default as an affirmative defense that is waived by the State's failure to assert it." *Brief For Petitioner* at 13, 20.

However, the fact that no state court in Louisiana ever expressly ruled upon the merits of Trest's collateral attacks on his Mississippi convictions under *Boykin* is clearly discernible from the record. Contrary to the petitioner's argument, this Honorable Court's decision in *Granberry*, which was subsequent to all the above-cited cases except *Gray v. Netherland, supra*, allowed the State

to belatedly raise the issue of procedural default for the first time on appeal. The petitioner at no time articulates how the Fifth Circuit's action is fundamentally unfair by the *sua sponte* invocation of procedural default. To read this Court's prior decisions to constitutionally prohibit the *sua sponte* invocation of procedural default under any and all circumstances would result in an inflexibility that the *Granberry* Court itself rejected.

In *Picard v. Connor*, 404 U.S. 270 (1971), upon which the *Gray* Court relied, this Court considered whether a claim not properly presented to the state or federal courts could entitle a federal habeas petitioner to relief. This Court required that "the substance of the federal habeas corpus claim must first be presented to the state courts..." *Gray*, __ U.S. __, 116 S.Ct. at 2081, citing *Picard*, 404 U.S. at 278. The *Picard* Court further recognized that "...we cannot fault that [state] court for failing also to consider *sua sponte* whether the indictment procedure" violated federal equal protection principles. *Id.* at 277.

Clearly the *Boykin* claim regarding Trest's collateral attack on his Mississippi conviction was not addressed by any court prior to the Fifth Circuit. This Honorable Court should recognize that at no time could the State of Louisiana have raised a procedural bar on this issue until late in the litigation following petitioner's filing of his objections to the magistrate's report in that the State was not put on notice as to the existence of such a claim until that time. The *Gray* Court itself recognized that a claim heretofore not presented to any state or federal court would be barred from consideration on federal habeas review. "If the claim was not raised or addressed in federal proceedings below, our usual practice would be to decline to review it." *Gray*, __ U.S. ___, 116 S.Ct. at

2082, citing *Yee v. Escondido*, 503 U.S. 519 (1992). In fact, this Court in *Gray* remanded the case back to the Court of Appeals "to determine whether petitioner in fact raised what's in his brief on the merits to this Court he asserts has been his 'fundamental complaint throughout this litigation." *Id.*, 116 S.Ct. at 2082-2083.

The instant record supports a finding that the only merits addressed by any court - state or federal - were the substance of the claims petitioner listed in the "Statement Of The Claims" No. 1 through No. 9. Regardless of what possible fault might lie with the State of Louisiana for not sifting through every word in petitioner's memorandum of law filed with the federal court, the simple fact remains that no court expressly ruled upon the merits even as to his "7B claim" regarding a perceived constitutional invalidity of the Mississippi guilty pleas used to enhance his Louisiana sentence, and that the petitioner at no time objected until he filed his objections to the magistrate's report. Admittedly, the District Attorney could have responded to petitioner's objections to the magistrate's report, but did not do so. Likewise, the district court could have addressed petitioner's objections, but again, did not do so. Does that mean that the Fifth Circuit was constitutionally foreclosed from addressing procedural default *sua sponte*? The rationale of this Court's decision in *Granberry* indicates that the answer is clearly no.

Petitioner herein is asking this Honorable Court to hold that should a state fail to invoke, either explicitly or implicitly, a state procedural bar, and thereby, irrevocably waive this defense, then the federal court must always address the merits of petitioner's claim, regardless of whether an independent and adequate state ground exists that would have barred such review. Petitioner's contention is simply incorrect in light of the *Granberry*

approach. In *Granberry* this Court rejected the hard and fast rule which the petitioner contends is constitutionally required. The *Granberry* Court, relying on *Strickland v. Washington*, 466 U.S. 668, 684 (1984), reasoned that a court may choose to ignore a state's waiver and dismiss the petition for nonexhaustion or procedural default, but there is no *per se* rule. Rather, district courts are "to exercise discretion in each case" and "determine whether the interests of comity and federalism will be better served by addressing the merits or dismissing the petition." *Id.* at 131. The facts of the instant case provide a good example as to how unworkable the absolute bar to *sua sponte* invocation of procedural default would be.

The Fifth Circuit was equally aware that even though the State of Louisiana appeared as the party respondent, comity and federalism issues were implicated given that Trest had not afforded the State of Mississippi, in the first instance, the opportunity to rule upon alleged constitutional infirmities of Mississippi convictions. The exhaustion requirement of 28 U.S.C. § 2254 clearly involves considerations of whether a petitioner has exhausted his claims for relief under the laws of the custodial state. To say that § 2254 plainly puts Louisiana on notice that it needed to be concerned with the exhaustion of laws of another non-custodial state, such as Mississippi, is clearly a far stretch. Nonetheless, the given scenario is exactly why this Honorable Court should not handcuff the federal courts by invoking a constitutional bar to the *sua sponte* invocation of procedural default. Cf. *Lindh v. Murphy*, __ U.S. ___ 117 S.Ct. 2059 (1997)(holding that the newly enacted Antiterrorism and Effective Death Penalty Act of 1996 (Pub.L. 104-132, 110 Stat. 1214 (April 24, 1996) applies only prospectively to federal habeas proceedings; new law

requires that state waivers of exhaustion requirements must be express.) *Compare* App. F at 27a-28a.

Based upon the foregoing authority, petitioner's contention that the Fifth Circuit could not *sua sponte* invoke procedural default is not consistent with prior binding precedent of this Honorable Court, and should be flatly and wholeheartedly rejected.

C. Other federal courts of appeals have allowed for the *sua sponte* invocation of procedural default.

As noted above, the Fifth Circuit's authority to *sua sponte* invoke procedural default has been recognized by other federal circuits as well. In *Esslinger v. Davis*, 44 F. 3d 1515 (11th Cir. 1995), the 11th Circuit for the U.S. Court of Appeals rejected the *sua sponte* invocation of procedural default, but only because the Court found an abuse of discretion based upon the misapplication of Alabama law. The Court wrote: "What federal interest would be served upholding a district court's misapplication of a state procedural bar to deny habeas relief? We can think of none." *Id.*, 44 F. 3d at 1526. At no time has the petitioner alleged to this Honorable Court that the Fifth Circuit incorrectly applied Mississippi law.[24] *But see Henderson v. Thieret*, 859 F. 2d 492, 493 (7th Cir. 1988), *cert. denied*, 490 U.S. 1009 (1989)(noting that the district court may raise procedural default *sua sponte* but not where state has implicitly indicated a desire to waive that defense.)

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[24] The *amicus curiae* brief filed by the State of Mississippi in this matter points out that the Fifth Circuit correctly applied Mississippi law.

Moreover, the *Esslinger* Court as well did not *per se* ban its lower federal courts from *sua sponte* invoking a procedural bar where a state has expressly waived the default. Rather, the Court recognized that "the district court may invoke the bar [of failure to exhaust] sua sponte where, notwithstanding the state's waiver, requiring the petitioner to return to state court to exhaust his claims serves an important federal interest. Another potential bar is the petitioner's failure to comply with a state procedural rule -- for example, a rule that specifies the time during a criminal prosecution, *or collateral proceeding attacking a conviction,* that a claim of error must be raised." *Id.*, 44 F. 3d at 1524 (Footnotes omitted, emphasis added).

Clearly the factual situation presented to the *Esslinger* Court is not similar to the factual situation of the instant case as the petitioner suggests. *See Brief For Petitioner* at 11. In citing *Granberry* at 134-35, the *Esslinger* Court recognized that despite a state's waiver, both comity and federalism may support a federal court's requiring complete exhaustion of state court remedies. Likewise, just as exhaustion recognizes a state's interest in resolving constitutional issues in the first instance, the doctrine of procedural default protects the state's interest in protecting convictions from untimely constitutional challenges.

Petitioner maintains that the Fifth Circuit's conclusion that it was foreclosed from the merits is equivalent to the conclusion that the Fifth Circuit believed it was required to *sua sponte* invoke procedural default. From reading the *Trest* opinion, one concludes that the Fifth Circuit's *sua sponte* invocation of procedural default is obviously based upon that federal court's recognition of the interest of the State of Mississippi in barring untimely collateral attacks on its own final criminal judgments.

Once the Fifth Circuit, in its discretion, undertook the recognition of Mississippi's interests and the procedural bar created by that State's independent and adequate procedural rule, the Court concluded that "...because the potential remedies in Mississippi courts for the constitutional defects..." as alleged by Trest "...were rendered unavailable by his own procedural default, federal courts, including those in Louisiana, are barred from reviewing these claims." *Id.*, 94 F. 3d at __, J.A. at 94-95.

II. The federal court of appeals properly decided it was foreclosed from reaching the merits of petitioner's habeas petition based upon a state procedural rule arising under Mississippi law.

A. The Fifth Circuit's foreclosure is consistent with the procedural default doctrine.

Once the procedural bar was raised *sua sponte,* the Fifth Circuit then recognized this Honorable Court's pronouncement in *Coleman v. Thompson*, 501 U.S. 722, 750 (1991) that the petitioner must establish "...*cause for the default and actual prejudice* as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in *a fundamental miscarriage of justice*." (Emphasis added.) *Trest*, 94 F. 3d at 1009 (J.A. at 95). *See also Wainwright*, 433 U.S. at 83, 88-89 also recognizing state procedural bar rule is a matter of comity and "serves the interest of finality and forces the issues to be considered when they are freshest and when the state's resources have been marshalled to address them." *See also Hardiman, supra,* at 503. Further, where no remedy exists due to failure to exhaust,

the problem becomes a determination that "cause and prejudice exists to excuse" the default. *Rust v. Zent*, 17 F. 3d 155, 160 (6th Cir. 1994). [By analogy, the *Teague* doctrine as well bars habeas relief. *See Caspari v. Bohlen*, 501 U.S. 383, 389 (1994)(nonretroactivity principle of *Teague* generally precludes habeas relief to state prisoner based upon the announcement of a new constitutional rule after prisoner's conviction and sentence have become final.)]

Based upon Trest's concession that he neither appealed the Mississippi convictions nor challenged them collaterally in Mississippi, the Fifth Circuit found that "[i]n the instant case, Trest neither alleges such cause and prejudice nor a fundamental miscarriage of justice; indeed, Trest had not even attempted to bear this burden. Hence, a federal district court in Louisiana cannot consider Trest's claims that his Mississippi convictions were somehow unconstitutional." *Id.*, J.A. at 95. *See Wainwright v. Sykes*, 433 U.S. 72 (1977)(establishing "cause and prejudice" standard for procedural default). The Fifth Circuit was clearly protecting Mississippi's interests in the finality of its judgments pursuant to considerations of comity and federalism.[25]

Certainly under *Coleman supra,* the Fifth Circuit, as its opinion in *Trest* suggests, had the authority to find

[25] By attaching the plea colloquy, Trest injected new evidence into the proceedings. As *Burgin v. Broglin*, 900 F. 2d 990, 998 (7th Cir. 1990), *citing Williams v. Duckworth*, 724 F. 2d 1439, 1442 (7th Cir. 1983), *cert. denied*, 469 U.S. 841 (1984), noted, "Perhaps this [failure to present evidence to supreme court] was a 'deliberate bypass' of the state court in the hopes that the federal forum might be more hospitable to his claim; perhaps petitioner was not seriously troubled by his counsel's performance and was merely casting about an additional issue when he drafted his habeas petition. In either case, it would be inappropriate for a federal court to become involved."

that an adequate state ground existed in Mississippi that could bar federal habeas relief. It is equally clear that the state courts of Mississippi had never been asked firsthand by Trest to review the constitutionality of the Mississippi guilty pleas, and that such relief to Trest was now barred as a matter of Mississippi law. *Coleman* recognizes that a federal habeas review of a constitutional claim is barred if there exists an independent and adequate state procedural rule justifying such a denial absent a showing of cause and actual prejudice or a demonstration of a fundamental miscarriage of justice. *Id.* at 750. While *Coleman* does not address the issue of *sua sponte* invocation of procedural default where a state court has not acted, once the default is raised, the *Coleman* Court recognized that a federal court is foreclosed from reviewing a constitutional claim that is clearly barred under state law.[26]

While the state prisoner in *Coleman* was found to have procedurally defaulted his claim by failing to timely appeal his federal claims in state court, and the Commonwealth had objected on the basis of procedural default, the fact that a federal court *sua sponte* invokes the adequate and independent state law doctrine should not change the result. In this case, admittedly no Louisiana court had addressed the merits of petitioner's claim that his Mississippi pleas were constitutionally infirm under *Boykin*, either on state procedural grounds or federal grounds. Furthermore, the proper forum for addressing

[26] In *Ford v. Georgia*, 498 U.S. 411 (1991), this Honorable Court reversed a decision by the Georgia Supreme Court that had held that a defendant's equal protection claim was procedurally barred. The Court found that the state bar at issue was not "affirmatively established and regularly followed" as required for a state procedural requirement to bar consideration of a federal claim. *Id.*, 498 U.S. at 422-424. Trest does not maintain that Mississippi's procedural bar is not firmly established and regularly followed.

the validity of the Mississippi convictions in the first instance would clearly have been the State of Mississippi and not the State of Louisiana. *See e.g.* Smith, *supra,* note 18 at 1335, *citing United States v. Custis*, 988 F. 2d 1355, 1361 (4th Cir. 1993), *aff'd*, *Custis v. United States*, 511 U.S. 485 (1994)(lower federal court recognizes "burden on prosecutors and courts, as well as problems of comity and federalism, that would arise from allowing fact-intensive hearing concerning prior convictions in other jurisdictions.") Petitioner's own inaction triggered an independent and adequate state procedural bar by which his claims were forfeited. For these reasons, the Fifth Circuit correctly concluded that it was foreclosed from reaching the merits based upon petitioner's default in Mississippi.

The Fifth Circuit could have reached the same result under Louisiana law. Certainly the newly raised *Boykin* claim is now procedurally barred in Louisiana given petitioner's repetitive filings. Therefore, for purposes of Louisiana law, Trest would as well be procedurally barred, and Louisiana's law would become an adequate and independent state procedural bar by which the Fifth Circuit could deny habeas relief. *See* La.C.Cr.P. art. 924 *et seq*. *See* App. C at 10a-19a. The question then becomes, did the Fifth Circuit constitutionally err by *sua sponte* relying upon a state procedural bar of a non-custodial state, i.e. Mississippi? This Court's policy reasons underlying *Coleman* should apply with equal force, regardless of which state's procedural laws formed the basis for the bar.

Furthermore, petitioner's position before this Honorable Court is directly contrary to this Court's policy announced in *Coleman* that once a federal court establishes that petitioner has defaulted his federal claims

in state court pursuant to an independent and adequate state procedural rule, federal review is barred unless the petitioner establishes cause and actual prejudice, as discussed, *infra*, or a fundamental miscarriage of justice. *See Coleman*, 501 U.S. at 750. This Court recognizes that the cause and actual prejudice standard was selected in order to afford deference by the federal courts to the respective States that state procedural rules or decisions resting squarely upon state law will be respected in the interests of comity and finality of the States' criminal prosecutions. In barring a federal habeas petition on the procedural default of failure to appeal, this Court stated in *Coleman*:

> We now recognize the important interest in finality served by state procedural rules, and the significant harm to the States that results from the failure of federal courts to respect them...All of the State's interests – in channeling the resolution of claims to the most appropriate forum, in finality, and in having an opportunity to correct its own errors -- are implicated whether a prisoner defaults one claim or all of them. A federal court generally should not interfere in either case.
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> *Id.*, 501 U.S. at 750.

This Honorable Court also recognized in *Coleman* that similar to state procedural rules, federal procedural rules are likely to bar consideration of federal claims on the basis that a claim has prescribed or is otherwise untimely even though the invocation of a particular federal procedural rule may bar consideration of a federal constitutional claim. *Id.*, 501 U.S. at 751. As this Court instructed, "No less respect should be given to state rules of procedure." *Id.*

Further, the Fifth Circuit's decision that it was foreclosed from addressing the merits once the procedural bar was invoked is correct. This decision is justified by the recognition of Mississippi's interest in preserving the finality of its convictions upon which no timely constitutional challenge has been made in its state courts in the first instance.

B. Petitioner is not "actually innocent" and the record does not support a finding of actual prejudice.

Moreover, the preclusion of federal habeas relief in this case does not offend the ends of justice or result in a fundamental miscarriage of justice a state prisoner may avoid the cause and prejudice hurdle by a showing of actual innocence. *Murray v. Carrier*, 477 U.S. 478, 496 (1986). The fundamental miscarriage of justice exception is available "only where the prisoner supplements his constitutional claim with a colorable showing of factual innocence." *Kuhlmann v. Wilson*, 477 U.S. 436, 454 (1986). In general, while the "miscarriage of justice" exception to procedural default is more loosely applied for purposes of procedural default than for purposes of failure to exhaust (wherein the petitioner may return to state court), the Second Circuit in *Washington, supra* at 1449-50, relying on *Granberry*, recognized this Honorable Court has narrowly limited the exception of fundamental miscarriage of justice to cases where petitioner "challenges the validity of trial itself" or where "federal violations were motivated by malice and not caused by mere inadvertence or poor judgment." Petitioner at no time has maintained actual innocence, either as it pertains

to his convictions in Louisiana or Mississippi. Nor could he.[27]

With such narrow exceptions, legitimate grounds of efficiency and finality would otherwise be ignored.

As a result, the Fifth Circuit correctly decided that it was foreclosed from reviewing the merits of petitioner's federal habeas petition.

III. Petitioner's habeas claims were not properly presented or properly raised.

As discussed above, the State of Louisiana further argues that the petitioner did not articulate a claim under *Boykin v. Alabama,* 395 U.S. 238 (1969) that his Mississippi guilty pleas were not intelligently and voluntarily made[28] until he incorporated this *Boykin* issue

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[27] As noted previously, petitioner, testifying at his armed robbery trial, admitted he robbed the victim, albeit, alleging he was unarmed, and that he been convicted of five burglaries in Mississippi, wherein the plea colloquy demonstrates that he admitted to those previous crimes as well. R. at 81, 120-130.

[28] The State of Louisiana argues herein the despite the District Attorney's failure to object before the Fifth Circuit regarding the newly raised *Boykin* claim that this Honorable Court should recognize that the petitioner's failure to raise the claim is now precluded from presenting the claim through his "inexcusable procedural default" as recognized in *Wainwright v. Sykes*, 433 U.S. 72 (1977). As the Western District of Louisiana noted in *United States v. Sincox*, 430 F.Supp. 1151, 1153 (W.D.La. 1977), *rev'd on other grounds*, 571 F. 2d 876 (5th Cir. 1978), relying on Justice Powell's concurrence in *Estelle v. Williams*, 425 U.S. 501, 507 (1976), "[b]lind and strict enforcement of constitutional rights is not necessarily required in order to insure the fundamental fairness of a trial. Due process is violated only when a defendant is forced to suffer deprivation of his rights, despite his objections to the proceedings to which he is subjected. Recent jurisprudence teaches that a conviction should be left standing despite a claimed infringement of a constitutional right when the

into his newly expanded "7B claim" in his objections to the federal magistrate's Report And Recommendation. Petitioner also attached for the first time the plea colloquy from Mississippi state court. J.A. at 77-83, R. at 206-222. Prior to that time, petitioner had not assigned as error the alleged invalidity of the Mississippi convictions in his "Statement Of The Claims" Nos. 1 through 9 in either his state post conviction relief application or his federal habeas application, which was based upon the identical nine grounds for relief. The only mention of the perceived invalidity of the Mississippi convictions is found in the petitioner's memoranda filed in both state, federal district court and the Fifth Circuit, in which petitioner complains in subpart 7 (B) (i.e. his "7B claim') that the Mississippi court record did not reflect that petitioner was advised "of his right to appeal his guilty plea..." and the Mississippi trial judge did not "inform Petitioner of his right to appeal or as to his right to counsel for said appeal...." J.A. at 3-23, 28-51, 19, 48; R.M. at 219.

The record before this Honorable Court[29] clearly demonstrates that, quite remarkably, even after filing the objections, his appellate brief to the Fifth Circuit drops the newly raised *Boykin* claim and does not address his other complaint voiced for the first time in his objections that the lower state and federal courts had also failed to

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defendant has made an 'inexcusable procedural default' in failing to object at a time when the substantive right could have been protected."

[29] Both the State of Louisiana and the petitioner have consented to enlarging the record for purposes of this Honorable Court's review and have likewise petitioned this Court to do so. *See Petitioner's Motion To Enlarge The Record* with attachments, *Respondent's Motion To Enlarge The Record* with attachments and *Respondent's Supplemental To Enlarge The Record* with attachments. At the time of this printing, the motions were pending before the Court.

address the merits of the "7B claim". R.M. at 205-222. In fact, his Fifth Circuit brief is almost identical to those he filed in the state court and federal district court. *Compare* R.M. at 205-22 with J.A. at 3-23 and J.A. at 28-36. The claims surrounding a constitutional challenge on the Mississippi convictions do not resurface again until the Fifth Circuit itself appoints Trest a lawyer and requests briefs on the *Custis* issue. J.A. at 86-87, R.M. at 202. *See Castille v. Peoples*, 489 U.S. 346, 349-351 (1989)(recognizing that habeas prisoner's raising issue for first time in state supreme court not "fair presentation" of claim for purposes of exhaustion.) *See also Washington v. Lane*, 840 F. 2d 443, 445 (7th Cir. 1988), *cert. denied*, 488 U.S. 861 (1988)(recognizing that if a petitioner fails to raise an issue in the state court proceedings, he cannot raise it for the first time in a federal habeas petition) and *Burgin*, *supra* at 994 (habeas prisoner who failed to bring relevant evidence to attention of state court during direct appeal waived right to habeas relief because evidence was not newly discovered; claim was procedurally defaulted despite state's failure to raise defense, court of appeals was not precluded from deciding that petitioner had committed procedural default.)

In his objections to the magistrate's report, petitioner for the first time questions the validity of his Mississippi convictions under *Boykin* on the grounds that he pleas were not intelligently and voluntarily made. While admittedly acting *pro se*, Trest's objections clearly indicated that he knew he could not add a new ground for relief when he wrote "[t]he issues presented herein are not new, the claim was properly raised and preserved through the course of the post-conviction/writ of habeas corpus application - the essential facts were raised unskillfully and obsured, [sic] but nevertheless raised and preserved."

J.A. at 77-83. While the State recognizes that allegations of a *pro se* prisoner are held to a less stringent standard for articulating his grievances than formal pleadings filed by lawyers, and that, such *pro se* pleadings are liberally construed, on the other hand, a *pro se* litigant is not permitted to disregard the substantive and procedural rules. *See Haines v. Kerner*, 404 U.S. 519 (1972), *Faretta v. California*, 422 U.S. 806, 834 n. 46 (1975), and *Guidroz v. Lynaugh*, 852 F. 2d 832, 834 (5th Cir. 1988). See also *United States v. Pinkey*, 548 F. 2d 305, 311 (10th Cir. 1977)(recognizing that a *pro se* litigant acquires no greater rights than a litigant represented by a lawyer).

The Fifth Circuit, in deciding petitioner's appeal from district court, expressly stated that it would review the district court's factual findings for clear error but review all legal issues *de novo*. *Trest v. Whitley*, 94 F. 3d at 1007, J.A. at 90. Following precedent, the Fifth Circuit cited *Lott v. Hargett*, 80 F. 3d 161, 163 (5th Cir. 1996), wherein the Court declined to review an inmate's federal habeas petition under *Boykin* finding that the trial court's invocation of Mississippi's statutory time limit was an independent and adequate state ground which barred federal review. *Id.*, 94 F. 3d at 1009, J.A. at 92-93.

Clearly, petitioner, no matter how unskilled, realized the *Boykin* claim was newly raised in his objections; otherwise, why did he attach the plea colloquy for the first time to support his claim? These actions show an awareness that Trest was raising a new claim for relief, which he knew was not permissible at that stage of the litigation. In addition, he knew and has conceded that he did not challenge his Mississippi convictions, either on direct or collateral review in Mississippi. Therefore,

Trest could have provided reasons for this procedural default at this point. This he failed to do.

In addition to the newly raised *Boykin* claim, petitioner's objections addressed his "7B claim" that was mentioned in memoranda to the state and lower federal court although not included in the list of nine claims in the application. However, the question arises as to whether the "7B claim" could be said to have been "fairly presented" in that the state trial court and the lower federal court appear to address only the merits of petitioner's Claim No. 7 that the evidence used against him at the state habitual offender hearing was illegal. The record herein supports a finding that the substance of the "7B claim" was neither fairly presented nor considered by the state or lower federal court. *See Anderson v. Harless*, 459 U.S. 4 (1982). Further, Trest's pro se last brief to the Fifth Circuit itself disregarded his previous grievance raised in the objections to the magistrate's report that the lower courts had ignored his "7B claim." Accordingly, the record before this Honorable Court does not support a conclusion that Trest had adequately raised and/or presented his constitutional challenges to the Mississippi convictions in the state or lower federal courts. *See Burgin, supra,* at 996, *citing Sotelo v. Indiana State Prison*, 850 F. 2d 1244, 1252 (7th Cir. 1988) (where inmate made Sixth Amendment claim on a different basis in state court than he did in federal district court, petitioner waives claim in federal court without a showing of cause and prejudice.)

IV. The federal court of appeals properly decided that a *pro se* petitioner had procedurally defaulted his constitutional claims by not pursuing those claims in

the State of Mississippi without first allowing the petitioner notice and an opportunity to be heard.[30]

In brief to this Honorable Court, petitioner argues that the *sua sponte* invocation of procedural default without first allowing him notice and an opportunity to be heard requires that the Fifth Circuit's decision in *Trest v. Whitley, supra* be reversed. [31] Petitioner relies upon the *Trest* dissent to support his position that the majority in *Trest* erred by not allowing the petitioner the opportunity

[30] The State of Louisiana, as respondent herein, directs this Honorable Court's attention to Rules of the Supreme Court of the United States, Rule 24 (1)(a) requiring the question presented for review, which provides, in pertinent part, that "...the brief may not raise additional questions or change the substance of the questions already presented in those documents." The State responds that petitioner's arguments on the issue of notice and opportunity to be heard under subheading I of petitioner's brief at iii are not fairly encompassed within the question in which this Honorable Court granted the petition for certiorari. *See* note 2, *supra*, and App. A at 5a-6a. However, as a precautionary mention, the State of Louisiana will argue this issue while retaining its original position at oral argument that the issue of notice and opportunity to be heard are not fairly encompassed within the question presented.

[31] The Fifth Circuit ruled that "[b]ecause his petition raises forfeited clams that are procedurally barred from review by this court, the judgment of the district court is AFFIRMED." *Trest* at 1006, J.A. 88. The Fifth Circuit relied upon *Sones v. Hargett*, 61 F. 3d 410 (5th Cir. 1995), Miss. Code Ann. § 99-39-5 (2), *Odom v. State*, 483 So. 2d 343 (Miss. 1986), and *Phillips v. State*, 421 So. 2d 476 (Miss. 1982), and *Culberson v. State*, 612 So. 2d 342 (Miss. 1992) for the position that Mississippi law bars consideration of any constitutional challenge against predicate convictions used to trigger a habitual offender enhancement of a subsequent conviction. *Id.*, J.A. 90-93. The Fifth Circuit further relied on its prior opinion in *Sones, supra*, for the position that a claim under *Boykin* involves both factual and legal issues which that Court would not address for the first time on appeal.

to respond to the procedural default issue once the Court raised it on its own motion. *See Trest*, 94 F. 3d at 1005, J.A. at 97, and *Brief For Petitioner* at 10. The dissent's reasoning presupposes that the State of Louisiana had to pose a procedural bar of another state based upon a belatedly considered collateral attack of a prior conviction involving that other state. Even though the Fifth Circuit certainly may have allowed Trest an opportunity to respond to the *sua sponte* invocation of the Mississippi procedural bar, the fact that the Court ruled summarily does not *ipso facto* mean that the Fifth Circuit abused its discretion.

In *Femia v. United States*, 47 F. 3d 519 (2d Cir. 1995), the Second Circuit for the United States Court of Appeals held that, under certain limited circumstances, a federal district court could *sua sponte* dismiss a habeas corpus petition without prior notice to the petitioner of the same. In *Femia*, the petitioner had filed a successive federal habeas petition. The *Femia* Court held that the district court was not required to give notice to the petitioner that it intended to dismiss based upon the abuse of writ doctrine when the ground for the dismissal was the lack of actual prejudice.

To overcome a state procedural bar to federal habeas relief, Trest would have to establish either cause and actual prejudice or a fundamental miscarriage of justice. The record before the Fifth Circuit indicated that petitioner was, in fact, represented by counsel at the time his Mississippi pleas were entered.[32] *See also Luna v. Black*, 772 F. 2d 448, 450-451 (8th Cir. 1995)(even assuming cause for procedural default due to defense

[32] Compare *Custis, supra*, holding the unless the Sixth Amendment right to counsel was violated, the due process clause did not allow collateral attacks on prior convictions at sentencing.

counsel's deficient performance in failing to object to prior convictions on basis there was no affirmative showing that defendant was represented by counsel, prisoner failed to demonstrate prejudice prong need for habeas review).

The *Femia* decision obviously recognized that a federal court *ought*, as a general rule, afford a petitioner an opportunity to explain his default. However, the *Femia* Court further recognized that there may be circumstances where affording such an opportunity results in a waste of judicial resources. The Second Circuit cautioned its holding, noting that "[s]ummary notice that a petition abuses the writ, and that the burden has shifted to the petitioner to show why the petition should not be dismissed, will not pass muster." *Id.*, 47 F. 3d at 523. On the other hand, the Court recognized a limited exception to the notice requirement "when the ground for dismissal is lack of actual prejudice...Unlike a cause determination, a finding of actual prejudice is one made on the merits based on the record...Moreover, notice serves little purpose when only prejudice is at issue. If the petition liberally construed admits of no possibility of actual prejudice, notice will not cure the defect." *Id.*, 47 F. 3d at 524.

In contrast to the actual prejudice analysis, the Second Circuit recognized that "[c]ause is quite a different manner...Such factors are usually outside the record and may be exclusively within the petitioner's knowledge, and thus will only come to light if properly asserted by the petitioner." *Id.* (citations omitted). In *Coleman, supra,* at 753, this Court stated "cause" must be "something external to the petitioner, something that cannot be attributed to him..."

The *Femia* Court reached its holding based upon the second prong of actual prejudice, finding that "[w]hen a prisoner, who may be unlearned in law and unskilled in pleading, offers a cognizable claim in a second or successive petition that appears to demonstrate actual prejudice, but fails to address adequately the issue of cause, prior notice is essential. If the petition, when viewed in the context of all prior proceedings, reveals no actual prejudice that would entitle the petitioner to relief, even if cause could be shown, a district court may dismiss the petition sua sponte..." *Id.*, 47 F. 3d at 524-525.

Given this Honorable Court's decision in *Custis*, an issue which the Fifth Circuit itself had requested both sides brief and orally argue, it is evident that even if petitioner had established cause for the default, within the confines of *Custis,* the Fifth Circuit could have properly found that the record before it clearly indicated no actual prejudice. [33] In order to succeed in a collateral attack under *Custis* in federal habeas review that was otherwise barred by procedural default, the state prisoner would have to show cause and actual prejudice. *See e.g.* Smith, *supra,* note 18 at 1340. Because the record shows no actual prejudice, the Fifth Circuit's summarily barring habeas relief was proper.

A. Petitioner accuses the Fifth Circuit of "sandbagging" him when, to the contrary, his poorly articulated and newly raised claims, in effect, "sandbagged" the state and lower federal courts from resolving the constitutional claims in the first instance.

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[33] *See e.g.* Smith, *supra,* note 18 at 1325-26, finding that *Custis* is "best viewed as part of the Court's campaign to enhance the speed, efficiency, and finality of justice by impeding defendant's ability to file repeated and protracted appeals."

Petitioner argues that the actions of the Fifth Circuit "sandbagged" him by invoking procedural default post-oral argument on the *Custis* issue by the Court rendering its opinion that petitioner was procedurally defaulted, and thereby, finding that the Court was foreclosed from addressing the merits. The petitioner further argues he was "sandbagged" by the Court's failure to allow petitioner the opportunity to demonstrate cause and actual prejudice for the default. *Brief For Petitioner* at 12. *See also Thomas v. Arn*, 474 U.S. 140, 147-155 (1985) (affirming Sixth Circuit's procedural rule requiring the filing of objections to the federal magistrate's report; otherwise, appellate review is precluded on any issue not contained in objections to prevent litigant from "sandbagging" district judge by failing to object and then appealing. Otherwise, court of appeal forced to consider claims never reviewed by the district court).

Unlike *Esslinger, supra,* wherein the magistrate *sua sponte* raised procedural bar of the custodial state of Alabama despite the State of Alabama's express waiver, and thereafter, held an evidentiary hearing, which resulted in a recommendation that the bar as an alternative means for dismissal, neither party to this litigation expected that a procedural bar evolving from the law of Mississippi would ultimately derail petitioner's federal habeas petition. However, the Fifth Circuit's course of action does not mean that petitioner was treated in a fundamentally unfair way. *See Michel v. Louisiana*, 350 U.S. 91, 97 (1956)("it is beyond question that under the Due Process Clause of the Fourteenth Amendment [a state] may attach reasonably time limitations to the assertion of federal constitutional rights.")

Quite notably, petitioner has not attempted to demonstrate in his brief to this Honorable Court what response *he would have made to the Fifth Circuit had the Court required that he establish cause and actual prejudice for the default.* Petitioner makes fleeting references to the claimed error but gives no analysis or authorities to support the assertion that "[t]he majority's conclusion that the Petitioner did not demonstrate the absence of a procedural bar or cause and prejudice for his default - when he had no reason for doing so based on the State's inaction and no notice of the need to make such a showing by the court of appeals - is contrary to the teaching of this court regarding the nature of that showing and is fundamentally unfair." *Brief For Petitioner* at 12. What would be the point of allowing a petitioner the opportunity to demonstrate cause, assuming he could, and knowing that the record did not support a finding of actual prejudice or a "fundamental miscarriage of justice"? *See Bannister, supra,* 100 F. 3d at 617, wherein the Eighth Circuit recognized that a state prisoner failed to demonstrate actual innocence to forgive procedural default, and a remand to such a determination was not necessary. Further, *Bannister* recognized that a state prisoner's claim that the district court was "simply incorrect", as Trest maintains in his brief to this Court, was not a sufficient allegation of cause for a procedural default.

Furthermore, the extensive procedural history of Trest's dealings with state and federal courts leads one to conclude that this state inmate was no stranger to the courthouse or to habeas corpus proceedings. He had ample opportunities to redress his constitutional grievances beginning with a contemporaneous objection through counsel at his trial, and continuing through his

direct review of his conviction and sentence and his first application for state post conviction relief on February 26, 1991. *See* App. F at 29a-40a for outline of complete procedural history. To foreclose a habeas petitioner at this late hour clearly cannot be deemed fundamentally unfair.

CONCLUSION

For the reasons herein, the Fifth Circuit's decision should be affirmed.

Respectfully submitted,

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APPENDICES

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APPENDIX A

(Letterhead Omitted In Printing)

May 27, 1997

James M. Bullers, Esq.
District Attorney, 26th Judicial District
P. O. Box 69
Benton, Louisiana 71006

Re: 96-7901 - Richard F. Trest v. Burl Cain, Warden

Dear Mr. Bullers:

The Court today entered the following order in the above stated case:

> "The motion of petitioner for leave to proceed in forma pauperis is granted. The petition for a writ of certiorari is granted limited to Question 1 presented by the petition."

Enclosed are Memoranda describing the procedures under the Rules, together with a Specification Chart for your use. To further assist you in preparing your case before this Court, a copy of the Guide for Counsel is enclosed. Although this case will not be calendared for oral argument this Term please note that

requests for extensions of time to file briefs on the merits are not favored.

If you have any questions, please feel free to telephone me.

Very truly yours,

WILLIAM K. SUTER, CLERK
/s/Sandy Nelson
SANDY NELSON
Merits Clerk
(202) 479-3032

Enclosures

APPENDIX B

CONSTITUTION OF THE UNITED STATES

Amendment V Grand Jury Indictment for Capital Crimes; Double Jeopardy; Self-Incrimination; Due Process of Law; Just Compensation for Property

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

* * * * * * * * * *

Amendment XIV Citizenship; Privileges and Immunities; Due Process; Equal Protection; Appointment of Representation; Disqualification of Officers; Public Debt; Enforcement

(In pertinent part)

Section 1. ...No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

APPENDIX C

LOUISIANA CODE OF CRIMINAL PROCEDURE

C.Cr.P. Art. 841 Bill of exceptions unnecessary; objections required - "as it existed in 1979"

An irregularity or error cannot be availed of after verdict unless it was objected to at the time of occurrence. A bill of exceptions to rulings or orders is unnecessary. It is sufficient that a party, at the time the ruling or order of the court is made or sought, makes known to the court, the action which he desires the court to take, or of his objections to the action of the court, and the grounds therefor.

The requirement of an objection shall not apply to the court's ruling on any written motion.

Amended by Acts 1974, No. 297, § 1.

C.Cr.P. Art. 912.1 Right of appeal and application for review; defendant

A. The defendant may appeal to the supreme court from a judgment in a capital case in which a sentence of death actually has been imposed.

B. The defendant may appeal to the court of appeal from a judgment in a criminal case triable by jury, except as provided in Paragraph A of this Article.

C. (1) In all other cases not otherwise provided by law, the defendant has the right of judicial review by application to the court of appeal for a writ of review. This application shall be accompanied by a complete record of all evidence upon which the judgment is based unless the defendant intelligently waives the right to cause all or any portion of the record to accompany the application.

(2) An application for review by the defendant shall not suspend the execution of sentence, unless the defendant is admitted to postconviction bail. *Added by Acts 1974, Ex. Sess., No. 28, § 1, eff. Jan. 1, 1975. Amended by Acts 1980, No. 516, § 1, eff. July 1, 1982; Acts 1986, No. 443, § 1.*

(Historical And Statutory Notes Omitted In Printing)

C.Cr.P. Art. 924 Application for post conviction relief

An application for post conviction relief is a petition filed by a person in custody after sentence following conviction for the commission of an offense seeking to have the conviction and sentence set aside.

"Custody" as used in this Title means detention or confinement, or probation or parole supervision, after sentence following conviction for the commission of an offense. *Added by Acts 1980, No. 429, § 1, eff. Jan. 1, 1981.*

C.Cr.P. Art. 924.1 Effect of appeal

An application for post conviction relief shall not be entertained if the petitioner may appeal the conviction and sentence which he seeks to challenge, or if an appeal is pending. *Added by Acts 1980, No. 429, § 1, eff. Jan.1, 1981.*

C.Cr.P. Art. 925 Venue

Applications for post conviction relief shall be filed in the parish in which the petitioner was convicted. *Added by Acts 1980, No. 429, § 1, eff. Jan 1, 1981.*

C.Cr.P. Art. 926 Petition

A. An application for post conviction relief shall be by written petition addressed to the district court for the parish in which the petitioner was convicted. A copy of the judgment of conviction and sentence shall be annexed to the petition, or the petition shall allege that a copy has been demanded and refused.

B. The petition shall allege:

(1) The name of the person in custody and the place of custody, if known, or it not known, a statement to that effect;

(2) The name of the custodian, if known, or if not known, a designation or description of him as far as possible;

(3) A statement of the grounds upon which relief is sought, specifying with reasonable particularity the factual basis for such relief;

(4) A statement of all prior applications for writs of habeas corpus or for post conviction relief filed by or on behalf of the person in custody in connection with his present custody; and

(5) All errors known or discoverable by the exercise of due diligence.

C. The application shall be signed by the petitioner and be accompanied by his affidavit that the allegations contained in the petition are true to the best of his information and belief.

D. The petitioner shall use the uniform application for post conviction relief approved by the Supreme Court of Louisiana. If the petitioner fails to use the uniform application, the court may provide the petitioner with the uniform application and require its use.

E. Inexcusable failure of the petitioner to comply with the provisions of this Article may be a basis for dismissal of his application. *Added by Acts 1980, No. 429, § 1, eff. Jan. 1, 1981.*

C.Cr.P. Art. 927 Procedural objections; answer

A. If an application alleges a claim which, if established, would entitle the petitioner to relief, the court shall order the custodian, through the district attorney in the parish in which the defendant was convicted, to file any procedural objections he may have, or an answer on the merits if there are no procedural objections, within a specified period not in excess of thirty days. If procedural objections are timely filed, no answer on the merits of the claim may be ordered until such objections have been considered and rulings thereon have become final.

B. In any order of the court requiring a response by the district attorney pursuant to this Article, the court shall render specific rulings dismissing any claim which, if established as alleged, would not entitle the petitioner to relief, and shall order a response only as to such claim or

claims which, if established as alleged, would entitle the petitioner to relief.

C. If the court orders an answer filed, the court need not order production of the petitioner except as provided in Article 930. *Added by Acts 1980, No. 429, § 1, eff. Jan. 1, 1981. Amended by Acts 1990, No. 523, § 1.*

C.Cr.P. Art. 928 Dismissal upon the pleadings

The application may be dismissed without an answer if the application fails to allege a claim which, if established, would entitle the petitioner to relief. *Added by Acts 1980, No. 429, § 1, eff. Jan. 1, 1981.*

C.Cr.P. Art. 929 Summary disposition

A. If the court determines that the factual and legal issues can be resolved based upon the application and answer, and supporting documents, including relevant transcripts, depositions, and other reliable documents submitted by either party or available to the court, the court may grant or deny relief without further proceedings.

B. For good cause, oral depositions of the petitioner and witnesses may be taken under conditions specified by the court. The court may authorize requests for admissions of fact and of genuineness of documents. In such matters, the court shall be guided by the Code of Civil Procedure. *Added by Acts 1980, No. 429, §, eff. Jan. 1, 1981.*

C.Cr.P. Art. 930 Evidentiary hearing

A. An evidentiary hearing for the taking of testimony or other evidence shall be ordered whenever there are questions of fact which cannot properly be resolved pursuant to Articles 928 and 929. The petitioner, in absence of an express waiver, is entitled to be present at such hearing, unless the only evidence to be received is evidence as permitted pursuant to Subsection B of this Section, and the petitioner has been or will be provided with copies of such evidence and an opportunity to respond thereto in writing.

B. Duly authenticated records, transcripts, depositions, documents, or portions thereof, or admissions of facts may be received in evidence.

C. No evidentiary hearing on the merits of a claim shall be ordered or conducted, nor shall any proffer of evidence be received over the objection of the respondent, and no ruling upon procedural objections to the petition shall purport to address the merits of the claim over the objection of the respondent, unless the court has first ruled upon all procedural objections raised by the respondent, and such rulings have become final. Any language in a ruling on procedural objections raised by the respondent which purports to address the merits of the claim shall be deemed as null, void and of no effect. *Added by Acts 1980, No. 429, § 1, eff. January 1, 1981. Amended by Acts 1990, No. 523, § 1.*

C.Cr.P. Art. 930.1 Judgment granting or denying relief under Articles 928, 929, and 930

A copy of the judgment granting or denying relief and written or transcribed reasons for the judgment shall be furnished to the petitioner, the district attorney, and the custodian. *Added by Acts 1980, No. 429, §, eff. Jan. 1, 1981.*

C.Cr.P. Art. 930.2 Burden of proof

The petitioner in an application for post conviction relief shall have the burden of proving that relief should be granted. *Added by Acts 1980, No. 429, § 1, eff. Jan. 1, 1981.*

C.Cr.P. Art. 930.3 Grounds

If the petitioner is in custody after sentence for conviction for an offense, relief shall be granted only on the following grounds:

(1) The conviction was obtained in violation of the constitution of the United States or the state of Louisiana;

(2) The court exceeded its jurisdiction;

(3) The conviction or sentence subjected him to double jeopardy;

(4) The limitations on the institution of prosecution has expired;

(5) The statute creating the offense for which he was convicted and sentenced is unconstitutional; or

(6) The conviction or sentence constitute the ex post facto application of law in violation of the constitution of the United States or the state of Louisiana. *Added by Acts 1980, No. 429, §, eff. Jan. 1, 1981.*

C.Cr.P. Art. 930.4 Repetitive applicants

A. Unless required in the interest of justice, any claim for relief which was fully litigated in an appeal from the proceedings leading to the judgment of conviction and sentence shall not be considered.

B. If the application alleges a claim of which the petitioner had knowledge and inexcusably failed to raise in the proceedings leading to conviction, the court may deny relief.

C. If the application alleges a claim which the petitioner raised in the trial court and inexcusably failed to pursue on appeal, the court may deny relief.

D. A successive application may be dismissed if it raises a new or different claim.

E. A successive application may be dismissed if it raises a new or different claim that was inexcusably omitted from a prior application.

F. If the court considers dismissing an application for failure of the petitioner to raise the claim in the proceedings leading to conviction, failure to urge the claim on appeal, or failure to include the claim in a prior application, the court shall order the petitioner to state reasons for his failure. If the court finds that the failure was excusable, it shall consider the merits of the claim. *Added by Acts 1980, No. 429, § 1, eff. Jan. 1, 1981*

C.Cr.P. Art. 930.5 Custody pending retrial; bail

If a court grants relief under an application for post conviction relief, the court shall order that the petitioner be held in custody pending a new trial if it appears that there are legally sufficient grounds upon which to reprosecute the petitioner.

In such a case, the petitioner shall be entitled to bail on the offense as though he has not been convicted in the offense. *Added by Acts 1980, No. 429, § 1, eff. Jan. 1, 1981.*

C.Cr.P. Art. 930.6 Review of trial court judgments

A. The petitioner may invoke the supervisory jurisdiction of the court of appeal if the trial court dismisses the application or otherwise denies relief on an

application for post conviction relief. No appeal lies from a judgment dismissing an application or otherwise denying relief.

B. If a statute or ordinance is declared unconstitutional, the state may appeal to the supreme court. If relief is granted on any other ground, the state may invoke the supervisory jurisdiction of the court of appeal.

C. Pending the state's application for writs, or pending the State's appeal, the district court or the court of appeal may stay the judgment granting relief. *Added by Acts 1980, No. 429, § 1, eff. Jan. 1, 1981. Amended by Acts 1985, No. 233, § 1.*

C.Cr.P. Art. 930.8 Time limitations; exceptions; prejudicial delay

A. No application for post conviction relief, including applications which seek an out-of-time appeal, shall be considered if it is filed more than three years after the judgment of conviction and sentence has become final under the provisions of Article 914 or 922, unless any of the following apply:

(1) The application alleges, and the petitioner proves or the state admits, that the facts upon which the claim is predicated were not known to the petitioner or his attorney.

(2) The claim asserted in the petition is based upon a final ruling of an appellate court establishing a theretofore unknown interpretation of constitutional law and petitioner establishes that this interpretation is retroactively applicable to his case, and the petition is filed within one year of the finality of such ruling.

(3) The application would already be barred by the provisions of this Article, but the application is filed on or before October 1, 1991.

(4) The person asserting the claim has been sentenced to death.

B. An application for post conviction relief which is timely filed, or which is allowed under an exception to the time limitation as set forth in Paragraph A of this Article, shall be dismissed upon a showing by the state of prejudice to its ability to respond to, negate, or rebut the allegations of the petition caused by events not under the control of the state which have transpired since the date of original conviction, if the court finds, after a hearing limited to that issue, that the state's ability to respond to, negate, or rebut such allegations has been materially prejudiced thereby.

C. At the time of sentencing, the trial court shall inform the defendant of the prescriptive period for post conviction relief. *Added by Acts 1990, No. 1023, § 1 eff. Oct. 1, 1990.*

APPENDIX D

LOUISIANA REVISED STATUTES

LA.R.S. 14:64 Armed robbery - (West 1978)

A. Armed robbery is the theft of anything of value from the person of another or which is in the immediate control of another, by use of force or intimidation, while armed with a dangerous weapon.

B. Whoever commits the crime of armed robbery shall be imprisoned at hard labor for not less than five years and for not more than ninety-nine years, without benefit of parole, probation or suspension of sentence.

Amended by Acts 1958, No. 380, § 1; Acts 1962, No. 475, § 1; Acts 1966, Ex.Sess., No. 5, § 1.

La.R.S. 15:529.1 (West 1979) Sentences for second and subsequent offenses; certificate of warden as evidence

A. Any person who, after having been convicted within this state of a felony, or who, after having been convicted under the laws of any other state or of the United States, or any foreign government or country of a crime which, if committed in this state would be a felony, thereafter commits any subsequent felony within this state,

upon conviction of said felony, shall be punished as follows:

(1) If the second felony is such that upon a first conviction the offender would be punishable by imprisonment for any term less than his natural life, then the sentence to imprisonment shall be for a determinate term not less than one-third the longest term and not more than twice the longest term prescribed for a first conviction;

(2) If the third felony is such that upon a first conviction, the offender would be punishable by imprisonment for any term less than his natural life then,

(a) The person shall be sentenced to imprisonment for any term not less than one-half the longest possible sentence prescribed for a first conviction; or

(b) If the third felony and each of the two prior felonies involved a violation of R.S. 14:34, R.S. 14:62.1, R.S. 14:65, R.S. 14:110(B), or of any crime punishable by imprisonment for more than twelve years, the person shall be imprisoned for the remainder of this natural life, without benefit of parole, probation or suspension of sentence.

(3) If the fourth or subsequent felony is such that, upon a first conviction, the offender would be punishable by imprisonment for any term less than his natural life then, the person shall be sentenced to imprisonment for the fourth subsequent felony for a determinate term not less than the longest

prescribed for a first conviction and not more than his natural life and in no case less than twenty years.

B. It is hereby declared to be the intent of this Section that an offender need not have been adjudged to be a second offender in a previous prosecution in order to be charged as, and adjudged to be, a third offender, or that an offender have been adjudged in a prior prosecution to be a third offender in order to be convicted as a fourth offender in a prosecution for a subsequent crime. Provided, however, that the offender shall be deemed a second offender only if the crime resulting in the second conviction shall have been committed after his first conviction; that one shall be deemed a third offender under this Section only if the crime resulting in the third conviction shall have been committed after his conviction for a crime which in fact caused him to be a second offender, whether or not he was adjudged to be a second offender in the prior instance; and that one shall be deemed to be a fourth offender under this Section only if the crime resulting in the fourth conviction shall have been committed after his conviction for a crime which in fact caused him to be a third offender, whether or not he was adjudged to be a third offender in the prior instance.

C. This section shall not be applicable in cases where more than five years have elapsed since the expiration of the maximum sentence, or sentences, of the previous conviction, or convictions, and the time of the commission of the

last felony for which he has been convicted. In computing the period of time as provided herein, any period of servitude by a person in a penal institution, within or without the state, shall be included in the computation of any of said five year periods.

D. If, at any time, either after conviction or sentence, it shall appear that a person convicted of a felony has previously been convicted of a felony under the laws of this state, or has been convicted under the laws of any other state or of the United States; or any foreign government or country of a crime, which, if committed in this state would be a felony, the district attorney of the parish in which subsequent conviction was had may file an information accusing the person of a previous conviction. Whereupon the court in which the subsequent conviction was had shall cause the person, whether confined in prison or otherwise, to be brought before it and shall inform him of the allegation contained in the information and of his right to be tried as to the truth thereof according to law and shall require the offender to say whether the allegations are true. If he denies the allegation of the information or refuses to answer or remains silent, his plea or the fact of his silence shall be entered on the record and the judge shall fix a day to inquire whether the offender has been convicted of a prior felony or felonies, as set forth in the information. If the judge finds that he has been convicted of a prior felony or felonies, or if he acknowledges or confesses in open court, after being duly cautioned as to his rights, that he has

been so convicted, the court shall sentence him to the previous sentence if already imposed, deducting from the new sentence the time actually served under the sentence so vacated.

E. Whenever it shall become known to any superintendent or prison, probation, parole, police, or other peace officer, that any person charged with or convicted of a felony has been previously convicted within the meaning of this Section, he shall immediately report the fact to the district attorney of the parish in which the charge lies, or the conviction has been had.

F. The certificates of the warden or other chief officer of any state prison, or of the superintendent or other chief officer of any penitentiary of this state or any other state of the United States, or of any foreign country, under the seal of his office, if he has a seal, containing the name the name of the person imprisoned, the photograph, and the finger prints of the person as they appear in the records of his office, a statement of the court in which a conviction was had, the date and time of sentence, length of time imprisoned, and date of discharge from prison or penitentiary, shall be prima facie evidence on the trial of any person for a second and subsequent offense of the imprisonment and of the discharge of the person, either by a pardon or expiration of his sentence, as the case may be under the conviction stated and set forth in the certificate. Acts 1956, No. 312, §§ 1-4, as amended Acts 1958, No. 469, § 1.

APPENDIX E

MISSISSIPPI CODE 1972 ANNOTATED

§ 99-39-5 Grounds for relief; time limitations

(1) Any prisoner in custody under sentence of a court of record in the State of Mississippi who claims:

(a) That the conviction or the sentence was imposed in violation of the Constitution of the United States or the Constitution or laws of Mississippi;

(b) That the trial court was without jurisdiction to impose sentence;

(c) That the statute under which the conviction and/or sentence was obtained is unconstitutional;

(d) That the sentence exceeds the maximum authorized by law;

(e) That there exists evidence of material facts, not previously presented and heard, that requires vacation of the conviction or sentence in the interest of justice;

(f) That his plea was made involuntarily;

(g) That his sentence has expired; his probation, parole or conditional release unlawfully revoked; or he is otherwise unlawfully held in custody;

(h) That he is entitled to an out-of-time appeal; or

(i) That the conviction or sentence is otherwise subject to collateral attack upon any grounds of alleged error heretofore available under any common law, statutory or other writ, motion,

petition, proceeding or remedy; may file a motion to vacate, set aside or correct the judgment or sentence, or for an out-of-time appeal.

(2) A motion for relief under this chapter shall be made within three (3) years after the time in which the prisoner's direct appeal is ruled upon by the Supreme Court of Mississippi or, in case no appeal is taken, within three (3) years after the time for taking an appeal from the judgment of conviction or sentence has expired, or in case of a guilty plea, within three(3) years after entry of the judgment of conviction. Excepted from this three-year statute of limitations are those cases in which the prisoner can demonstrate either that there has been an intervening decision of the Supreme Court of either the State of Mississippi or the United States which would have actually adversely affected the outcome of his conviction or sentence or that he has evidence, not reasonably discoverable at the time of trial, which is of such nature that it would be practically conclusive that had such been introduced at trial it would have caused a different result in the conviction or sentence. Likewise excepted are those cases in which the prisoner claims that his sentence has expired or his probation, parole or conditional release has been unlawfully revoked.

(3) This motion is not a substitute for, nor does it affect, any remedy incident to the proceeding in the trial court, or direct review of the conviction or sentence.

(4) Proceedings under this chapter shall be subject to the provisions of Section 99-19-42.

APPENDIX F

UNITED STATES CODE
TITLE 28

(Law prior to amendment in relevant part)

§ 2254. State custody; remedies in Federal courts

...**(b)** An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.

(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

(June 25, 1948, c. 646, 62 Stat. 967; November 2, 1966; Pub.L. 89-711, §2, 80 Stat. 1105.)

UNITED STATES CODE

TITLE 28

(Law post amendment in relevant part)

§ 2254. State custody; remedies in Federal courts

...**(b)(1)** An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that –

(A) the applicant has exhausted the remedies available in the courts of the State; or

(B)(i) there is an absence of available State corrective process; or

(ii) circumstances exist that render such process ineffective to protect the rights of the applicant.

(2) An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State.

(3) A State shall not be deemed to have waived the exhaustion requirement or be stopped from reliance upon the requirement unless the State, through counsel, expressly waives the requirement.

(As amended Apr. 24, 1996, Pub.L.104-132, Title I, § 104, 110 Stat. 1218.)

APPENDIX G

OUTLINE OF RICHARD FRANKLIN TREST'S PROCEDURAL HISTORY*

12/26/78	Petitioner committed offense of armed robbery.
1/5/79	Grand jury indicted Petitioner for armed robbery.
3/29/79	Petitioner convicted of armed robbery in 26th Judicial District, Parish of Bossier, State of Louisiana, following a jury trial that commenced on March 26, 1979.
4/19/79	State filed habitual offender bill of information against petitioner based on five prior 1976 Mississippi felony guilty pleas to the felony offense of burglary.
4/24/79	Petitioner appeared in court on bill and entered a not guilty plea.
6/8/79	Habitual offender hearing: • Petitioner found to be a habitual offender under La. R.S. 15:529.1 after his motion to quash the habitual offender bill filed by trial counsel S. Patrick Phillips was denied.

* The respondent's Statement Of The Case has described in great detail Trest's procedural history in state and federal court. *See, supra*, 3-16. This summary chart has been complied for the convenience of the Court.

- Petitioner was sentenced to 35 years at hard labor without the benefit of probation, parole or suspension under La. R.S. 14:64 (West 1978).

- Petitioner through counsel Phillips, filed a motion to appeal in which he never constitutionally challenged the 1976 Mississippi guilty pleas used to enhance his Louisiana sentence.

7/18/79 Petitioner's counsel filed a motion for extension of time for specification of errors.

8/17/79 Specifications of errors filed, none of which raise constitutional challenge to the Mississippi convictions. Those assigned errors were:

- Testimony of person not a witness to the crime of armed robbery;

- Recessing court at 3:38 p.m. to allow state to secure witnesses;

- Witness identification of petitioner;

- Witness testimony of petitioner's alleged other offenses; and

- Refusal to grant motion for mistrial.

11/21/79 Petitioner filed appeal brief with Louisiana Supreme Court.

1/21/80 District Attorney filed appellate brief with Louisiana Supreme Court.

2/6/80 Louisiana Supreme Court affirmed trial court's determinations and affirmed petitioner's conviction and sentence.

2/21/80 Petitioner requested rehearing with Louisiana Supreme Court.

3/3/80 Louisiana Supreme Court denied rehearing request.

2/26/81 Petitioner filed a his first *pro se* petition for post conviction relief entitled *Petition For Writ Of Habeas Corpus* with the trial court, which did not set forth a challenge to the Mississippi convictions. The assigned errors were:

- Jury instruction relieved the state of burden of proof; and

- Closing argument shifted the burden of the state to prove each element of the crime.

3/2/81 Trial court denied relief; judgment became final without further review.

10/21/83 Petitioner filed a second *pro se* petition for

post conviction relief entitled *Application For Writ Of Habeas Corpus* and supporting memorandum, neither of which included a challenge to the Mississippi convictions. The assigned errors were:

- Ineffective assistance of counsel;
- Testimony of other crimes evidence;
- Jury charges shifted burden of proof of the state raised for second time;
- Testimony of detective who allegedly violated sequestration rule;
- More severe sentence imposed because petitioner opted to trial; and
- Requested inspection for error patent.

4/18/84 After the District Attorney filed answer to October 21, 1983 application, trial court denied relief.

5/7/84 Petitioner filed an application for rehearing with the trial court which was denied.

9/6/84 Petitioner filed a petition for review in Louisiana Supreme Court along with a supporting brief, which did not challenge constitutionality of Mississippi convictions.

4/1/85 Louisiana Supreme Court denied supervisory writs; judgment became final when no further review was sought.

1/17/90* Petitioner filed a third *pro se* application for post conviction relief entitled *Motion to Correct Illegal Sentence;* the application alleged that "[t]he entire multiple offender proceedings were in violation of L.S.A. R.S. 15:529.1.". The list of claims were as follows:

1. The trial court erred by not quashing the multiple offender bill of information as being vindictive by the prosecutor.

2. The trial court failed to inform petitioner of the right to be tried as to the truth of the multiple offender bill of information and as to a "formal hearing".

3. The trial court failed to inform petitioner of the requirement to say whether the allegations within the multiple offender charge were true.

---

* For the first time petitioner challenges Mississippi convictions through a memorandum expanding his claim no. 7 by stating in this application that illegal evidence was used at his habitual offender hearing to add his "7B claim".

4. The trial court erred by allowing defense counsel to enter the not guilty plea to said charge.

5. The trial court failed to advise petitioner of the right to "remain silent" and not to incriminate himself as to prior felony convictions.

6. There was insufficient evidence produced during multiple offender trial to show whether or not the prior felony conviction ended in a pardon.

7. The evidence introduced by the State as to prior felony convictions was illegally entered into evidence.

8. The trial court erred by ordering said second offender sentence to be without parole.

9. The trial court erred by not indicating the factors it had considered for imposing the sentencing in the record as required by LSA-C.Cr.P. Article 894.1.

As support for the nine claims, petitioner attached a supporting memorandum which expanded claim number 7 to parts A and B. Petitioner's "7B claim" argued:

- That the Mississippi guilty pleas were invalid because he was not informed of three factors: "right" to appeal, "right"

to counsel on appeal and maximum sentence that could be imposed.

3/26/90 Without response by District Attorney, trial court denied relief without addressing "7B claim".

7/13/90 Petitioner filed application for *Writ of Supervisory and/or Review* with the Louisiana Supreme Court and attached thereto the same post conviction application and supporting memorandum that he had filed with the trial court on January 17, 1990. Petitioner did not complain that the trail court had not addressed his "7B claim".

5/17/91 Louisiana Supreme Court denied review of this application on January 17, 1990. Judgment becomes final with no further review sought.

9/30/91 Petitioner filed a *pro se* petition under 28 § U.S.C. 2254 for a federal writ of habeas corpus with the United States District Court for the Western District of Louisiana, Shreveport Division. This petition was identical to the post conviction application filed with the trial court on 1/17/90. Petitioner again did not complain that the trial court had not addressed his "7B claim".

1/9/92 District Attorney filed an answer to application for a federal writ of habeas corpus conceding petitioner's exhaustion of state court remedies; District Attorney addressed claim number 7 contained in the application but did not address the "7B claim" in Trest's supporting memorandum.

1/24/92 Petitioner filed a motion in traverse to state's answer to application for federal writ of habeas corpus, reasserting the same claims in this application without mentioning the "7B claim".

2/2/94 U.S. magistrate issued Report And Recommendation regarding the application for federal habeas corpus, concluding that the State of Louisiana had complied with all due process requirements, but did not address petitioner's "7B claim" concerning the alleged invalidity of the Mississippi convictions.

2/18/94 Petitioner filed *Objections to Magistrate's Report And Recommendation*, asserting for the first time two objections:

That the federal magistrate had not addressed the merits of his "7B claim" based upon the Mississippi trial court's failure to advise him of his alleged right to appeal, alleged right to counsel on appeal, and maximum sentence to be imposed at

time of 1976 guilty pleas. Petitioner also adds for the first time a claim under Boykin v. Alabama that the guilty pleas were not intelligently and voluntarily made and attached the plea colloquy in support. The District Attorney did not respond to the petitioner's objections.

5/13/94 U.S. District Court adopted the magistrate's Report and Recommendation, which denied the petitioner's application for federal habeas relief. The order recognized petitioner's objections without further comment.

5/26/94 Petitioner filed with the U.S. District Court for the Western District of Louisiana, Shreveport Division, a *Notice of Intent to Appeal* along with a petition for *Certificate Of Probable Cause To Appeal* to the Fifth Circuit Court of Appeals.

6/20/94 U.S. District Court denied the petition for *Certificate of Probable Cause*.

11/7/94 Petitioner filed a fourth *pro se* application for post conviction relief entitled *Petition for Habeas Corpus* with the Louisiana trial court in Bossier Parish, 26th Judicial District, urging equal protection violations and ineffective assistance of counsel under

alleged discrimination in the selection process of grand jury foreman.

11/14/94 District Attorney filed an answer and supplemental answer to application for post conviction relief; lodged procedural bar pursuant to La.C.Cr.P. Art. 930.8.

11/17/94 Trial court denied relief.

11/18/94 Petitioner filed *Traverse In Oppostion To The State's Response* which trial court denied and referred back to November 17, 1994 reasons for judgment.

12/29/94 Petitioner filed an application for a writ of review with the Louisiana Supreme Court, asserting the same claims contained in November 17, 1994 post conviction application to the trial court.

08/15/94 Petitioner filed an appeal from the decision of the United States District Court for the Western District of Louisiana, Shreveport Division, with the United States Court of Appeals, Fifth Circuit. In this appeal he asserted the same claims as he had previously raised in his January 17, 1990 state post conviction relief application and his September 30, 1991 federal habeas. Petitioner did not re-argue his claim that the "7B claim" was ignored or raise his Boykin claim regarding the voluntariness of his Mississippi guilty pleas.

6/26/95 Following a two-page response by the District Attorney which simply incorporated the State's previous answer filed January 9, 1992, Federal Public Defender, Rebecca Hudsmith, was appointed by the Fifth Circuit as counsel for petitioner. Both the District Attorney and petitioner were ordered to submit supplemental briefs addressing Custes v. United States, 511 U.S. 485 (1994).

12/7/95 Parties orally argue Custis issue to Fifth Circuit.

9/17/96 Fifth Circuit held that it was precluded from reviewing the merits of petitioner's claims because those claims were procedurally barred from federal court scrutiny.

10/1/96 Petitioner filed a petition for rehearing and petition for rehearing en banc with the Fifth Circuit Court of Appeals.

10/29/96 Fifth Circuit denied both rehearing and rehearing en banc.

11/15/96 Louisiana Supreme Court denied the application for a writ of review filed on December 29, 1994, regarding alleged racial discrimination in selection of grand jury forepersons. Judgment became final when no further review sought.

1/27/97	Petitioner applied to U.S. Supreme Court for a writ of certiorari, which was granted as to Question No. 1 as raised by petitioner.

Supreme Court, U.S.
FILED
OCT 21 1997
CLERK

No. 96-7901

In The

Supreme Court of the United States

October Term, 1997

RICHARD F. TREST,

Petitioner,

vs.

BURL CAIN, WARDEN,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

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ARGUMENT

I. PETITIONER SHOULD HAVE RECEIVED NOTICE AND AN OPPORTUNITY TO RESPOND TO THE LOWER COURT'S INTENT TO DENY RELIEF BASED UPON PROCEDURAL DEFAULT

Respondent concedes that the federal courts should, as a general rule, afford a petitioner an opportunity to respond to a court's intent to invoke a procedural default bar.[1] *See* Respondent's Brief at 45-46. In defending the court of appeals' failure in this regard, the Respondent relies on the Second Circuit's opinion in *Femia v. United States*, 47 F.3d 519 (2nd Cir. 1995), for the proposition that *sua sponte* dismissal of a habeas petition without prior notice is permissible where the petition, when viewed in the context of all prior proceedings, reveals no actual prejudice that would entitle the petitioner to relief, even

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[1] In a footnote, the Respondent argues that the Petitioner's arguments regarding the court of appeals' error in invoking the procedural default *sua sponte* without first giving the Petitioner notice and an opportunity to address the issue are not fairly encompassed in the question presented to this Court for review. Brief for Respondent at 44, n. 30. Supreme Court Rule 24.1(a), cited by the Respondent, provides that "the brief may not raise additional questions or change the substance of the questions already presented" in the petition for a writ of certiorari or the jurisdictional statement. Additionally, however, Rule 14.1(a), provides: "The statement of any question presented is deemed to comprise every subsidiary question fairly included therein." The argument that if a federal court does intend to invoke *sua sponte* a waived defense of procedural default it must give the petitioner notice and an opportunity to be heard is a subsidiary issue fairly included in the issue of whether the court of appeals is required to invoke *sua sponte* the issue of procedural default.

if cause were shown.[2] Brief for Respondent at 47. Citing to *Custis v. United States*, 511 U.S. 485 (1994), the Respondent then concludes that "the Fifth Circuit could have properly found that the record before it clearly indicated no actual prejudice." Brief for Respondent at 47. This is sheer speculation on the Respondent's part.[3]

Respondent further argues that the Petitioner fails to articulate "how the Fifth Circuit's action is fundamentally unfair by the *sua sponte* invocation of procedural default," Brief for Respondent at 28. Respondent, nevertheless, concedes that "neither party to this litigation *expected* that

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[2] In *Femia*, which involved a dismissal for abuse of the writ, the Second Circuit upheld the dismissal without prior notice to the petitioner because the petition, when viewed in the context of the prior habeas proceedings, revealed no actual prejudice. 47 F.3d at 524. However, the court was careful to note that "[i]f the lack of actual prejudice in such a case is not clearly manifest from the record, the court should not dismiss the petition *sua sponte*, much less do so without prior notice to the petitioner." *Id.* at 525.

[3] The Respondent does not question the merits of Petitioner's challenge to his Louisiana enhanced sentence on the basis of the unconstitutionality of the underlying Mississippi guilty pleas. Rather, the Respondent claims that, under *Custis*, the fact that Petitioner was represented by counsel ends the inquiry into the constitutionality of the underlying Mississippi convictions. *See* Brief for Respondent at 45, n. 32. *Custis*, however, concerned the extent to which a federal criminal defendant could attack a prior conviction used for enhancement in the context of federal sentencing. This Court concluded that, in that setting, an attack on the prior conviction was limited to a determination of whether the conviction was obtained in violation of the right to counsel. 511 U.S. at 487. *Custis* is not pertinent to Petitioner's claim. Thus, the lack of actual prejudice is not clearly manifest from the record here.

a procedural bar evolving from the law of Mississippi would ultimately derail petitioner's federal habeas petition." Brief for Respondent at 48 (emphasis added).

Indeed, Petitioner had no indication from the State of Louisiana or from any court, including the Fifth Circuit as late as at the oral argument in the case, that a procedural default defense based upon Mississippi post-conviction procedural law would become an issue in a case involving custody supported by a Louisiana judgment. Because the court of appeals did not give him fair notice and an opportunity to be heard, Petitioner was not able to argue the insufficiency of the Mississippi procedural rule, as applied to a Louisiana judgment, to limit review of his constitutional claim. *See Ford v. Georgia*, 498 U.S. 411, 423-424 (1991). Moreover, Petitioner had no opportunity to address the validity of the application of a Mississippi procedural rule in this context in light of the concerns of comity and federalism underlying the rule of procedural default and cause and prejudice. It is fundamentally unfair to deny the Petitioner a merits review of his claim without giving him any opportunity to address the many important and complex issues raised by the appellate court's *sua sponte* invocation of a procedural default based on the law of the state other than the state whose judgment is at issue.

Counsel acting as an advocate for the Petitioner may have made a difference in the resolution of these issues in the lower court. Counsel and Petitioner were denied this opportunity, however, and this case should be remanded so that counsel may assist Petitioner in addressing what has become the determinative issue in the case.

II. THE PANEL MAJORITY'S OPINION BELOW IS NOT CONSISTENT WITH *GRANBERRY V. GREER*

The opinion below does not even cite *Granberry v. Greer*, 481 U.S. 129 (1987). Naturally, the considerations enunciated in *Grandberry* informing a federal court's exercise of discretion to invoke *sua sponte* a defense of exhaustion waived by the State were not considered in the text of the opinion. Nevertheless, the Respondent devotes the majority of its brief on the merits (unlike its earlier brief in opposition) to an attempt to establish that the court of appeals' decision is consistent with *Granberry*. The opinion below cannot be read so generously.

The majority opinion makes no reference to Respondent's failure to assert the defense of procedural default at any point in this litigation.[4] While the court did not specifically rule that the procedural default defense could never be waived, its omission of any reference to the Respondent's failure to raise the defense certainly suggests that the court did not believe that omission had any significance. This is contrary to this Court's holdings that procedural default is an affirmative defense the State is obligated to raise. *See Gray v. Netherland*, 116 S.Ct. 2074, 2083 (1996). It is also contrary to this Court's "middle course" adopted in *Granberry* in the face of a State's failure to assert timely the defense of exhaustion. *See Granberry, supra*, 481 U.S. at 131-133.

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[4] Nevertheless, the panel majority was certainly aware of Respondent's failure to assert a procedural default bar as this was recognized in Judge Parker's dissenting opinion. JA 97 ("By failing to raise the procedural default as a defense, the State lost the right to assert that defense.").

Even under the discretionary middle course approach adopted in *Granberry*, the Fifth Circuit's opinion cannot be upheld. In the present case, the Louisiana State court judgment by which the Petitioner is held in custody in a Louisiana prison does not rest on any violation of Louisiana's procedural rules. Nor is the Louisiana State court judgment based upon Petitioner's default of Mississippi's procedural rules. Thus, a federal court decision on the merits of Petitioner's claim challenging his Louisiana custody based on the unconstitutionality of his underlying Mississippi convictions does not undermine the interests of the State of Louisiana in enforcing its laws or correcting its own mistakes. Under these circumstances, there are no concerns of comity and federalism that come into play, and the federal court should decide Petitioner's claim on the merits. Nevertheless, the Respondent urges that the State of Mississippi has an interest in barring untimely collateral attacks on its own final judgments that the opinion below recognizes by invoking a supposed Mississippi procedural default rule to bar a merits review of Petitioner's claim.[5] *See* Brief for Respondent at 32. Further, Respondent argues that "even though the State of Louisiana appeared as the party respondent, comity and federalism issues were implicated given that Trest had not afforded the State of Mississippi, in the first

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[5] Yet the Respondent admits that "[a] Louisiana court obviously reviewing this matter in the first instance would only determine the validity of an out-of-state plea limited to its use for enhancement purposes only." Brief of Respondent at 24, n. 22. And further: "The State of Louisiana has no authority to invalidate a Mississippi conviction in the first instance." Brief of Respondent at 24, n. 23.

instance, the opportunity to rule upon alleged constitutional infirmities of Mississippi convictions." Brief of Respondent at 30.[6]

The fallacy in the Respondent's arguments is that the concerns of comity and federalism and the respect for a State's interest in correcting its own mistakes reflected in

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[6] The State of Mississippi appearing as *amicus curiae* in support of the Respondent, along with the States of Florida, Montana, and Nevada, does not specify Mississippi's interest in applying its procedural rules to bar consideration of a challenge by a prisoner in custody pursuant to a Louisiana judgment when that challenge involves the underlying Mississippi conviction only insofar as it is used to enhance a Louisiana sentence, other than to state: "[b]y holding the claim was procedurally barred, the Court of Appeals was promoting judicial economy, the interest of federalism, comity and finality of state court judgments." Brief of the State of Mississippi And 3 States As *Amici Curiae* In Support Of Respondent at 21. Both *amici curiae* and the Respondent seem to suggest that the Fifth Circuit, since it is familiar with the procedural rules of the states within its circuit – Louisiana, Mississippi and Texas – should readily apply those rules to protect the interests of those states. Brief of The State Of Mississippi And 3 States As *Amici Curiae* In Support of Respondent at 22; Brief of Respondent at 20-21. If Petitioner's prior convictions had arisen in a state outside of the Fifth Circuit, *amici curiae* and Respondent would apparently not see the need for the Fifth Circuit or a federal district court within the Fifth Circuit to take the time and effort to become familiar with the post conviction procedural rules of that state (potentially any one or all of the other 47 states) in order to determine whether that state's rule, like Mississippi's, require that its conviction be challenged timely in state post conviction proceedings. It is difficult to understand why the interests of the states within the Fifth Circuit in the application of their procedural rules in a challenge to a Louisiana sentence would be greater (if any such interest existed) than the interests of the other 47 states.

the rule of procedural default arise in connection with a State court judgment (and the independent and adequate state ground upon which that judgment rests) pursuant to which a petitioner is in custody. Here, the Petitioner is not in custody pursuant to a Mississippi State court judgment. Nor is the Louisiana judgment pursuant to which Petitioner is in custody based on any adequate and independent Mississippi procedural ground. Moreover, as the Respondent admits, a Louisiana court reviewing a final Mississippi conviction would be limited to a determination of whether under Louisiana and federal constitutional law the conviction should have the collateral consequence of serving as a basis for a Louisiana enhanced sentence. The Mississippi conviction at issue nevertheless remains final.

Rather than basing its decision on a considered judgment of the competing interests at stake, the court below concluded that it was precluded from reviewing the merits of the Petitioner's challenge to his Louisiana sentence as enhanced by unconstitutional Mississippi convictions. JA 90. It is clear from the opinion that the Fifth Circuit concluded that it had no discretion but was required to raise and enforce *sua sponte* the procedural default. As the Respondent concedes, this is not the law. Accordingly, the judgment of the court of appeals must be vacated.

III. THE RESPONDENT'S CLAIM OF FAILURE TO EXHAUST, RAISED FOR THE FIRST TIME IN ITS BRIEF ON THE MERITS, MUST BE DEEMED WAIVED

The Respondent argues for the first time in its brief on the merits that Petitioner's *Boykin v. Alabama*, 395 U.S. 228 (1969), challenge to his Louisiana enhanced sentence on the basis of the unconstitutionality of his Mississippi convictions was not previously raised in the Louisiana State courts. *See* Brief of Respondent at 11, n. 13, 12, 22 n. 21, 28, 39 and n. 27, 40-43. Moreover, the Respondent suggests that Petitioner's claim challenging the unconstitutionality of the Mississippi convictions that was advanced in the body of his memorandum of law attached to his state uniform application for post-conviction relief, but not specifically listed in the statement of claims at the beginning of that memorandum, *see* JA 8, 9, 19-20, was not fairly presented to the State courts as a result. Brief for Respondent at 43.[7]

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[7] In his memorandum of law filed in the state court, the Petitioner urged that the Mississippi convictions could not be used for enhancement purposes because the Mississippi trial records failed to show that Petitioner had been advised of his right to appeal his conviction and sentence. JA 19. In support, the Petitioner cited to *State v. Robicheaux*, 412 So.2d 1313, 1316-17 (La. 1982), wherein the Louisiana Supreme Court concluded that a guilty plea violated *Boykin* and that the conviction supported by that plea could not be used to enhance the defendant's sentence. Additionally, the Petitioner alleged that "[i]f Petitioner's Mississippi felony convictions *are infirm by all of his constitutional rights being unknown to him or offered to him by the Mississippi court*, then Louisiana Constitution Article 1, Section 19 [providing for a right of judicial review based upon a complete record of all evidence upon which a judgment is based], disallows enhancement punishment from those unconstitutional convictions in Mississippi." JA 20 (emphasis added). The State courts were certainly aware that Petitioner was challenging the use of the underlying Mississippi convictions as a basis for enhancement of his Louisiana sentence based on the inadequacies of his Mississippi guilty plea colloquy. While the State court may have chosen to ignore the claim as set forth in the body of the memorandum, that is not determinative of whether the claim is exhausted. *See Smith v. Digmon*, 434 U.S. 332 (1978). Nor did the Petitioner's filing of the transcript of the guilty plea in the federal district court fundamentally alter the substance of the claim as presented to the State courts. *See Vasquez v. Hillery*, 474 U.S. 254, 260 (1986).

This argument is clearly waived as the Respondent concedes its failure to raise any exhaustion defense at any time, *see* Brief of Respondent at 18 n. 19, 29, 39 n. 28, despite countless opportunities to do so. Given that the Respondent did not raise exhaustion in its brief in opposition to Petitioner's request for certiorari review, Respondent's assertion of exhaustion for the first time in its brief on the merits comes too late to be considered by this Court. *See, e.g., Schiro v. Farley*, 510 U.S. 222, 228-229 (1994) (where State failed to raise *Teague* argument in its brief in opposition to the petition for a writ of certiorari, Court would not address the issue as a basis in support of the judgment below); *City of Canton, Ohio v. Harris*, 489 U.S. 378, 385 (1989) (State's failure to inform this Court prior to grant of certiorari review that petitioner had arguably conceded point below does not provide basis for the Court to abstain from addressing the question before it); *City of Oklahoma City v. Tuttle*, 471 U.S. 808, 816 (1985) (because of respondent's failure to bring to attention of the Court a nonjurisdictional defect no later than in

Respondent's brief in opposition to the petition for certiorari, the defect is deemed waived). Accordingly, the Respondent's late argument that the Petitioner failed to exhaust his claim based on *Boykin* should be deemed waived.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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No. 96-7901

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

RICHARD F. TREST,

Petitioner,

v.

BURL CAIN, WARDEN,
LOUISIANA STATE PENITENTIARY,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF FOR THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether the Court of Appeals entertaining a state prisoner's federal habeas corpus claims is foreclosed from reviewing the claims on the merits and must consider *sua sponte* the affirmative defense of procedural default where the State has never asserted the defense and the state courts have not relied on it in addressing petitioner's claims.

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BRIEF FOR THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

INTEREST OF *AMICUS CURIAE*

Founded in 1958, the National Association of Criminal Defense Lawyers is one of the Nation's leading organizations advancing the mission of criminal defense lawyers to ensure justice and due process for persons accused and convicted of crime. NACDL's mission, as defined in its bylaws, is to "Ensure justice and due process for persons accused of crime . . . Foster the integrity, independence and expertise of the criminal defense profession . . . and Promote the proper and fair administration of criminal justice." NACDL has 9,000 members nationwide — along with 78 state and local affiliate organizations numbering 25,000 members — including private criminal defense lawyers, public defenders and law professors committed to preserving fairness within America's criminal justice system. NACDL has a long-standing tradition of demonstrated interest in safeguarding the rights of all persons involved in the criminal justice system along with preserving and strengthening our adversary system of justice. It has appeared before this Court on many occasions as *amicus curiae*. *See, e.g.*, *Cooper v. Oklahoma*, 116 S.Ct. 1373 (1996); *Montana v. Egelhoff*, 116 S.Ct. 2013 (1996).[1]

SUMMARY OF ARGUMENT

1. The Court of Appeals erred in *sua sponte* invoking procedural default where the Louisiana state and federal

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[1] Both parties have consented to NACDL's appearance in this matter as *amicus curiae*. No counsel for any party has authored this brief in whole or in part and no person or entity, other than *amicus curiae*, has made a monetary contribution to the preparation or submission of this brief. Sup. Ct. Rule 37.6.

courts had not relied upon it nor was it raised by the state. Petitioner need not return to the Mississippi courts to attack his predicate convictions where the Louisiana courts, which imposed multiple offender status, entertained his *Boykin* claims against the Mississippi predicates and did not invoke procedural default. He thus exhausted the necessary judicial remedies of the state under whose jurisdiction he was presently in custody.

2. The state's waiver of procedural default ordinarily should bind the Court of Appeals absent a jurisdictional defect or the rare instance of a clearly articulated nonjurisdictional value, such as comity or federalism. In this case, where the state courts entertained petitioner's claims and did not invoke procedural default, there is no institutional value for the federal courts to vindicate by enforcing state procedural rules more rigorously than the state courts themselves.

3. The Court of Appeals should not have summarily invoked Mississippi procedural law without first giving the parties notice and an opportunity to respond to its possible misinterpretation of Louisiana and federal law. The federal courts exercising habeas jurisdiction should be required to give the parties notice before taking such summary action.

ARGUMENT

I. THE COURT OF APPEALS ERRED IN INVOKING PROCEDURAL DEFAULT WHERE PETITIONER PROPERLY EXHAUSTED THE STATE REMEDIES OF LOUISIANA RATHER THAN MISSISSIPPI IN ATTACKING HIS HABITUAL OFFENDER STATUS IN LOUISIANA

At first blush, this case appears to present a question of federal law analogous to that previously considered in *Granberry v. Greer*, 481 U.S. 129 (1987) — whether the federal courts of appeals must give *sua sponte* consideration to a state prisoner's procedural default in state court where the state has waived its affirmative defense of procedural default in the federal proceeding.

Upon closer scrutiny, however, it becomes clear that this case presents an even more fundamental question antecedent to the state's alleged "waiver" — *viz.*, whether the courts of appeals must consider procedural default *sua sponte* where the state courts themselves never relied on it and have otherwise entertained the habeas petitioner's claims.

In this case, petitioner presented his challenges to his antecedent Mississippi state convictions to the Louisiana state courts which declared him a habitual offender based upon those earlier out-of-state convictions. La. Rev. Stat. §15-529.1. The Louisiana state (and federal) courts denied his claims without considering any alleged failure to present his claims to the Mississippi courts in the first instance.

Indeed, there is no suggestion in the record that Louisiana prosecutors defending this action ever argued procedural default in the state (or federal) courts based on failure to present these claims to the Mississippi courts. *See, e.g., Ulster County Court v. Allen*, 442 U.S. 140, 149, 152 (1979);

Shepard v. Foltz, 771 F.2d 962, 965 (6th Cir. 1985)("if the state prosecutor only argued the merits of the petitioner's claim before the state courts and never raised the procedural default issue, the federal courts may assume that the state courts relied only on the merits").

Accordingly, where the Louisiana courts declaring him a habitual offender entertained petitioner's post-conviction attacks on his antecedent Mississippi convictions, there was no need for him to pursue his claims in the Mississippi courts in order to exhaust his state remedies. Petitioner thus did not default his claims when he pursued them in the state courts of Louisiana rather than those of Mississippi. Indeed, the prosecutor in this case has conceded as much (State's Cert. Opp. 2).

The Court of Appeals, then, was clearly in error in its *sua sponte* reliance on *Sones v. Hargett*, 61 F.3d 410 (5th Cir. 1995), in finding petitioner time-barred from collaterally attacking his Mississippi convictions in the Mississippi courts. *Trest v. Whitley*, 94 F.3d 1005, 1007-08 (5th Cir. 1996). Whatever legal barriers may have existed under Mississippi law, petitioner was not foreclosed from collaterally attacking the use of his Mississippi convictions in the Louisiana courts where they served as predicates for declaring him a habitual offender under Louisiana law.

A. Petitioner Committed No Procedural Default By Exhausting His Remedies In The State Courts Of Louisiana Rather Than Mississippi

The fatal flaw in the Court of Appeals' analysis was its determination that petitioner was compelled to return to the Mississippi courts to attack his antecedent Mississippi convictions. Finding petitioner's Mississippi post-conviction remedies time-barred, the Court of Appeals summarily

declared him in procedural default and denied relief. 94 F.3d at 1007-08 (relying on *Sones*, 61 F.3d at 416-18).

Petitioner, however, is presently "in custody" (28 U.S.C. §2254(a)) pursuant to a judgment of conviction for armed robbery entered in the state courts of Louisiana in 1979. Under Louisiana's habitual offender law (La. Rev. Stat. §15:529.1), petitioner was adjudicated a multiple offender based upon his prior 1976 burglary convictions in Mississippi. Petitioner sought post-conviction relief in the Louisiana courts where he attacked the Louisiana sentencing court's enhancement based upon those prior Mississippi convictions, alleging that these predicates were unconstitutional under *Boykin v. Alabama*, 395 U.S. 238 (1969). (In particular, he attacked the Mississippi sentencing court's failure to advise him of the constitutional rights he was waiving by pleading guilty as well as the maximum possible sentence he might receive).

The Court of Appeals' reliance on *Sones*, then, was fatally flawed. Whatever relevance *Sones* may have to collateral attacks on Mississippi predicates in Mississippi habitual offender proceedings, it has none with respect to the use of Mississippi predicates in out-of-state (*e.g.*, Louisiana) habitual offender proceedings where the Louisiana courts entertain collateral attacks on the constitutionality of the out-of-state predicates. Notwithstanding the absence of Mississippi state remedies by which to attack these predicate Mississippi convictions, the state courts of Louisiana provided a presently available post-conviction remedy by which petitioner could (and did) attack the validity of these out-of-state convictions and their subsequent use against him in Louisiana habitual offender proceedings. *See* La. Code Crim. Proc. art. 924 *et seq.* (post-conviction relief statute); *see especially id.* art.

930.3(1)(collateral attack available for violations of the Constitutions of Louisiana and the United States).[2]

B. The Federal Courts Could Properly Entertain Petitioner's Attack On The Enhancement Of His Louisiana Sentence With Predicate Convictions From Mississippi Where The Louisiana Post-Conviction Courts Have Entertained His Enhancement Claims

To the extent that petitioner attacked his Mississippi convictions insofar as they were used as predicates to enhance his Louisiana sentence under the latter state's habitual offender law, he is presently "in custody" (§2254(a)) pursuant to his Louisiana conviction as enhanced by his earlier Mississippi predicates. He thus has standing to collaterally attack the use of his earlier Mississippi predicates in the state and federal courts of Louisiana. *See Maleng v. Cook*, 490 U.S. 488, 494 (1989); *Garlotte v. Fordice*, 115 S.Ct. 1948, 1952 n.4 (1995) (*Maleng* "left open the possibility . . . that the conviction underlying the expired sentence might be

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[2] Louisiana case law is fully in accord. *See, e.g., State v. Shelton*, 621 So.2d 769, 773 & n.8, 775 & n.14, 776 n.15 (La. 1993)(adopting *Parke v. Raley* [506 U.S. 20 (1992)] standard for use of prior guilty plea convictions as predicate offenses in multiple offender proceedings; applicable to post-conviction attacks on out-of-state predicates); *State v. Youngblood*, 647 So.2d 1388, 1389-90 (La. Ct. App. 1994)(post-conviction relief available to attack out-of-state convictions in multiple offender proceeding); *State v. Martin*, 427 So.2d 1182, 1186, 1187 (La. 1983)(post-conviction relief available to multiple offender whose predicate conviction is based on an uncounseled guilty plea); *State v. Wilson*, 599 So.2d 321, 322 (La. Ct. App. 1992)(post-conviction relief available to attack habitual offender proceeding where defendant was not informed of his constitutional right to remain silent with respect to predicate convictions); *State v. Johnson*, 548 So.2d 1274, 1275 (La. Ct. App. 1989) (accord).

subject to challenge in a collateral attack upon the subsequent sentence that the expired sentence was used to enhance"); *Custis v. United States*, 511 U.S. 485, 512 n.7 (1994)(Souter, J., dissenting)("Court of Appeals decisions postdating *Maleng* have uniformly read it as consistent with the view that federal habeas courts may review prior convictions relied upon for sentence enhancement and grant appropriate relief"); *Smith v. Farley*, 25 F.3d 1363, 1365-66 (7th Cir. 1994)("Because a person currently serving a sentence that was enhanced on the basis of a prior conviction is still in custody, he may challenge the enhancing conviction as constitutionally invalid even though that conviction's prior sentence has expired"); *Tredway v. Farley*, 35 F.3d 288, 295 (7th Cir. 1994)("'[O]nce the State breathes new life into a dormant conviction, it only seems appropriate that the defendant should then have the opportunity to challenge the conviction's validity'"); *Willis v. Collins*, 989 F.2d 187, 189 (5th Cir. 1993)("'positive and demonstrable nexus between . . . current custody and the allegedly unconstitutional [prior] conviction' . . . [is] 'sufficient to meet the jurisdictional requirements of §2254(a)'"); *Crank v. Duckworth*, 905 F.2d 1090, 1091 (7th Cir. 1990)("*Maleng* holds that when sentence A has expired but has been used to augment sentence B, the prisoner is 'in custody' only on sentence B. The consequences of sentence A for sentence B do not yield continued custody *on sentence A*. * * * [But] a person in custody on sentence B may contend that *that* custody violates the Constitution if it was augmented because of an invalid sentence A")(emphasis in original).

Nor are any federalism or comity concerns violated by virtue of the state and federal courts of Louisiana entertaining collateral attacks on Mississippi convictions insofar as they

are used to enhance Louisiana sentences. As analogized by the Seventh Circuit in precisely this context (*Smith v. Farley*, 25 F.3d at 1368 n.10):

> Suppose State A imposes the first conviction and State B the second. State B may offer the defendant review of his earlier State A conviction only as far as its new use in State B. Since such a defendant would not be seeking to set aside his State A conviction as constitutionally invalid, but merely to challenge the constitutionality of his conviction as used to enhance his present sentence in State B, principles of federalism, comity, and full faith and credit are not as directly implicated.

Accordingly, where the state and federal courts of Louisiana entertained collateral attacks on petitioner's prior Mississippi convictions as predicates for his Louisiana habitual offender sentence, petitioner was not obligated to seek post-conviction relief from the Mississippi state courts; *a fortiori* there was no procedural default committed in this case. Under the circumstances, then, the state did not "waive" a procedural default that, indeed, never occurred. Since this Court has noted that the federal courts are not obliged to honor state procedural rules more sedulously than do the state courts themselves — *Harris v. Reed*, 489 U.S. 255, 265 n.12 (1989)("if the state court under state law chooses not to rely on a procedural bar . . . , then there is no basis for a federal habeas court's refusing to consider the merits of the federal claim") — the Court of Appeals committed clear error in relying *sua sponte* on a procedural default that, in fact, never existed. Standing by itself, this error warrants summary vacatur of the Court of Appeals' judgment irrespective of the question of the state's alleged "waiver" of the (nonexistent) procedural default.

II. THE STATE'S WAIVER OF PROCEDURAL DEFAULT ORDINARILY SHOULD BIND THE COURT OF APPEALS ABSENT A JURISDICTIONAL DEFECT OR THE RARE INSTANCE OF A CLEARLY ARTICULATED NONJURISDICTIONAL VALUE THAT TRANSCENDS THE INTERESTS OF THE PARTIES

This Court has held repeatedly that where the state fails to apprise the federal courts in a timely fashion of a state procedural bar, the procedural default rule does not preclude federal habeas relief. Consequently, if state prosecutors — or the state courts themselves — choose not to notice a default — or fail to make any such assertion in a timely manner — the federal courts show no disrespect for the state's interest by reaching the merits. *See, e.g., Ford v. Georgia*, 498 U.S. 411, 420-21 n.5 (1991)(Court declines to consider adequate and independent state procedural ground in part because the state has failed to assert it in timely fashion); *Beck v. Alabama*, 447 U.S. 625, 630 n.6 (1980)(state waived procedural default claim by stating in certiorari response that issues were "fully considered" and "correctly decided" by state courts); *Jenkins v. Anderson*, 447 U.S. 231, 234 n.1 (1980)(*Sykes* defense waived when not asserted in lower federal courts); *Estelle v. Smith*, 451 U.S. 454, 468 n.12 (1981)(accord); *Ulster County Court v. Allen*, 442 U.S. at 152 (state's attorney's failure to raise procedural bar in state courts suggests state courts rejected claims on merits).

Moreover, this Court has regularly determined that various habeas defenses such as exhaustion of state remedies, procedural default, nonretroactivity and abuse of the writ are nonjurisdictional in nature and may be waived by the state absent their timely assertion. *See, e.g., Schiro v. Farley*, 510

U.S. 222, 227-28 (1994)(*Teague* nonjurisdictional); *McCleskey v. Zant*, 499 U.S. 467, 494 (1991)(abuse of the writ nonjurisdictional); *Harris v. Reed*, 489 U.S. at 265 n.12 (procedural default nonjurisdictional in habeas); *Gray v. Netherland*, 116 S.Ct. 2074, 2082 (1996)(accord); *Granberry v. Greer*, 481 U.S. at 132 (exhaustion nonjurisdictional).

The lower federal courts have held similarly that waiver and forfeiture are not doctrines that apply one-sidedly only against habeas petitioners. Rather, the state may also forfeit a procedural defense by failing to assert it in a timely manner and at the appropriate point in the course of habeas litigation. *See, e.g., Fagan v. Washington*, 942 F.2d 1155, 1157 (7th Cir. 1991)(the state "waived waiver" by failing to assert it in a timely manner)(collecting cases); *Henderson v. Thieret*, 859 F.2d 492, 497-98 (7th Cir. 1988)(accord); *see also Falconer v. Lane*, 905 F.2d 1129, 1135 (7th Cir. 1990)("Waiver is not an obstacle reserved for habeas petitioners alone"); *Smith v. Zant*, 887 F.2d 1407, 1438 (11th Cir. 1989)(*en banc*) (Kravitch, J., concurring)("Waiver of claims is not a principle that works only to the detriment of [habeas] petitioners"); *Caspari v. Bohlen*, 510 U.S. 383, 397 (1994)(Stevens, J., dissenting)("In recent years, the Court has fashioned harsh rules regarding waiver and claim forfeiture to defeat substantial constitutional claims. If we are to apply such a strict approach to waiver in habeas corpus litigation, we should hold the warden to the same standard").

In this case, of course, there was no "waiver" at all, strictly speaking. Rather, the state has explicitly *conceded* that petitioner properly exhausted his state remedies by having litigated his claims through the Louisiana — rather than Mississippi — state courts. *See* Point I, *supra*. There is, thus, no waiver by default or a merely implicit waiver by the state. Accordingly, the Court of Appeals should have been

required to set forth some countervailing policy consideration inherent in the "exigencies of federalism" (*Fay v. Noia*, 372 U.S. 391, 433 (1963)) or "considerations of comity" (*Wainwright v. Sykes*, 433 U.S. 72, 84 (1977)) to justify its permissive authority to act *sua sponte*. The only policy prescriptions even remotely applicable here, however, have no application in the case of procedural default, whatever their possible relevance in the context of exhaustion.

In *Granberry v. Greer*, 481 U.S. at 134-35, this Court indicated its "reluctance to adopt rules that allow a [habeas] party to withhold a defense [here, nonexhaustion] until after the 'main event' — in this case the proceedings in the District Court — is over". It ruled, however, that when the state fails to raise an "arguably meritorious nonexhaustion defense", "[t]he court should determine whether the interests of comity and federalism will be better served by addressing the merits forthwith or by requiring . . . additional state and district court proceedings". *Id.* at 134-35.[3]

These federalism considerations have no application here. Unlike the nonexhaustion situation, where the state courts have had no prior opportunity to consider petitioner's claims (and the federal courts may have an interest in affording the state courts that first opportunity where an unresolved question of state or federal law may be involved), the state

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[3] While the Antiterrorism and Effective Death Penalty Act of 1996 (Pub. L. 104-132, 110 Stat. 1214 (April 24, 1996)) has changed the waiver standard applicable to the exhaustion defense, requiring that such waivers be express and forbidding state waivers by default — *see* newly-enacted 28 U.S.C. §2254(b)(3) — the new standard has no application in this case. This Court has recently determined that the new habeas statute applies only prospectively to federal habeas proceedings commenced after its April 24, 1996 enactment. *See Lindh v. Murphy*, 65 U.S.L.W. 4557 (U.S. June 23, 1997).

courts here have already considered petitioner's claims and denied relief on the merits.

Thus, notwithstanding *Granberry*'s reliance on the unique attributes of the exhaustion doctrine that distinguish it from procedural default — e.g., exhaustion's applicability when federal review may be postponed, but not foreclosed, pending invocation of available state remedies — a state's explicit waiver of procedural default, unlike its waiver of exhaustion, removes *all* bases for federal court reliance on the default, as the adequate and independent ground rule protects only the interests of the states and none of the federal courts. *See Harris v. Reed*, 489 U.S. at 265 n.12; *Ulster County Court v. Allen*, 442 U.S. at 152-54. Accordingly, the state's waiver of procedural default should require the federal courts to reach the merits of petitioner's claims. *Cf. Hagen v. Utah*, 510 U.S. 399, 410 (1994)("We see no reason to consider an argument that [Hagen] not only refuses to raise but also expressly refused to rely upon"); 2 James S. Liebman & Randy Hertz, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE §22.1 at 647 n.39 & §26.2a at 816-17 n.2 (2d ed. 1994).

Here, then, where the state courts have had a first opportunity to consider petitioner's claims, and have not invoked procedural default, there are no aspects of comity or federalism which warrant the federal courts according greater deference to state procedural rules than have the state courts themselves, particularly where the state's attorney — the state's designated representative in the federal courts — has not requested it.

III. THE COURT OF APPEALS ERRED IN "SANDBAGGING" THE LITIGANTS BY CONSIDERING PROCEDURAL DEFAULT *SUA SPONTE* WITHOUT NOTICE AND AN OPPORTUNITY TO BE HEARD

While the Court of Appeals tartly chided the parties for failing to cite or discuss *Sones v. Hargett*, *supra*, in their briefs and oral argument (94 F.3d at 1007 n.2), in retrospect, the parties correctly analyzed the applicable principles of federal and (Louisiana) state law; *Sones* was (and is) manifestly irrelevant to the correct disposition of this case. Had the Court of Appeals first sought guidance from the parties on this question, rather than addressing it peremptorily in denying relief, the lower court might well have avoided plain error under both federal and Louisiana law. *See, e.g., Esslinger v. Davis*, 44 F.3d 1515, 1526, 1528 & n.45 (11th Cir. 1995)(magistrate judge's *sua sponte* invocation of procedural default was "based on a rank misinterpretation of Alabama law" and "district court's misapplication of a state procedural bar").

This Court has warned litigants that they may not "sandbag" their adversaries or the courts by strategically withholding seasonable claims and defenses only to belatedly spring them unannounced at some later phase of the litigation. *Wainwright v. Sykes*, 433 U.S. at 89. This principle applies with equal measure to the courts of appeals, which should not spring new claims or defenses not addressed by the parties in earlier phases of the litigation without — at an irreducible minimum — affording the parties an opportunity to address and respond to newly-arisen developments in the litigation. *See Esslinger*, 44 F.3d at 1528 ("we think it fundamentally unfair for a court *sua sponte* to invoke a procedural default without giving the petitioner an opportunity to show cause for

the default. In this case, the magistrate judge, and the district court, effectively 'sandbagged' the petitioner").

Under similar circumstances, the courts of appeals themselves have repeatedly cautioned that, whether the defense be exhaustion, procedural default, nonretroactivity or abuse of the writ, where it is raised by the district court in the first instance, the habeas petitioner must be given an appropriate opportunity to respond to the defense. *See Lugo v. Keane*, 15 F.3d 29, 30-31 (2d Cir. 1994)("No principle is more fundamental to our system of judicial administration than that a person is entitled to notice before adverse judicial action is taken against him"); *accord*: *United States v. Cullum*, 47 F.3d 763, 764 (5th Cir. 1995); *United States v. Warner*, 23 F.3d 287, 291 (10th Cir. 1994); *Hardiman v. Reynolds*, 971 F.2d 500, 505 (10th Cir. 1992); *Urdy v. McCotter*, 773 F.2d 652, 656-57 (5th Cir. 1985); *Esslinger*, 44 F.3d at 1528.

Here, the Court of Appeals' *sua sponte* reliance on Mississippi procedural law appears to have been based upon a misinterpretation of Louisiana (and federal) law. Had the lower court first given the parties an opportunity to respond to its contemplated course of action, it could have been quickly disabused of its misinterpretation and promptly turned its attention to the merits of petitioner's claims.

Accordingly, this Court, acting in its supervisory capacity, should underscore that where the lower federal courts exercising habeas jurisdiction contemplate consideration of a potentially dispositive claim or defense not raised by the parties, the litigants must first be given notice and an opportunity to be heard on the issue.

CONCLUSION

The judgment of the Court of Appeals should be reversed.

Respectfully submitted,

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IN THE

Supreme Court of The United States

OCTOBER TERM, 1997

RICHARD F. TREST,

Petitioner,

VERSUS

BURL CAIN, WARDEN,
LOUISIANA STATE PENITNETIARY,

Respondent.

On Writ of Certiorari to the United States Court of Appeal for the Fifth Circuit

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BRIEF OF THE STATE OF MISSISSIPPI AND 3 STATES AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Whether, despite the State's failure to raise the affirmative defense of procedural default at any stage in the federal habeas corpus proceedings, the court of appeals is required to raise the defense *sua sponte* and is foreclosed from reviewing the claim on the merits based upon its conclusion that the claim is procedurally defaulted?

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No. 96-7901

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1996

RICHARD F. TREST,

Petitioner,

versus

BURL CAIN, WARDEN,
LOUISIANA STATE PENITENTIARY,

Respondent.

On Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit

BRIEF OF THE STATE OF MISSISSIPPI AND 6 STATES AS AMICI CURIAE IN SUPPORT OF RESPONDENT

INTEREST OF THE AMICI CURIAE

The amici States seek affirmance of the decision of the United States Court of Appeals for the Fifth Circuit in ***Trest v. Whitley***, 94 F.3d 1005 (5th Cir. 1996), which

has been granted review by the Court. The States now present their position in the interest of: 1) finality of state court judgments; 2) comity between the states; 3) principles of federalism; and, 4) furtherance of judicial economy.

SUMMARY OF ARGUMENT

The Court should extend the rule announced in ***Granberry v. Greer***, 481 U.S. 129 (1987), to allow federal habeas corpus courts, including courts of appeals, to raise, *sua sponte* if necessary, state procedural bars that would be dispositive of claims without having to remand for further state court proceedings. Such a rule would promote judicial economy and finality of state court judgments, as well as comity and federalism.

ARGUMENT

In ***Trest v. Whitley***, the Court of Appeals held that petitioner's claim relating to the validity of his prior Mississippi convictions to enhance his present Louisiana conviction was procedurally barred from consideration. The only thing unusual regarding this matter is that the Fifth Circuit raised the procedural bar to consideration of the claim *sua sponte*. The question being considered by this Court is whether Court of Appeals had the authority to raise the procedural bar *sua sponte*. The facts of this case are rather unusual in that it involves the application of a procedural bar present in one state to a case in a sister state.

Trest's troubles began in Mississippi when he was convicted by guilty plea for five counts of burglary in May 24, 1976. Trest was sentenced to serve four years

in the custody of the Mississippi Department of Correction on each of these convictions.[1] The trial court ordered that these five four year sentences were to be served concurrently. On July 13, 1978, after Trest had served only two years of his four year sentences, the trial court reopened the case and suspended the remainder of the four year sentences. Thus petitioner was released from prison in Mississippi after the service of little more than two years.

Under Mississippi law Trest had no right of appeal from his guilty pleas. MISS. CODE ANN. § 99-35-101 (1972), reads:

> Any person convicted of an offense in a circuit court may appeal to the supreme court, provided, however, *an appeal from the circuit court to the supreme court shall not be allowed in any case where the defendant enters a plea of guilty*.
>
> [Emphasis added.]

[1]Under Miss. Code Ann. §97-17-19 (1972)(repealed April 11, 1996), petitioner could have received ten (10) years on each of the counts of burglary. The trial court could have imposed the maximum sentence and ordered the sentences to be served consecutively.

The avenue available to Trest to challenge his convictions was by of filing a writ of error coram nobis with the trial court[2]. Trest did not file such a petition either during his time of confinement or after he was released from custody.

In 1984 the Mississippi Legislature enacted a comprehensive post-conviction collateral relief act that replaced the previous statutory error coram nobis method of post-conviction relief. *See* MISS. CODE ANN. § 99-39-1 *et seq.* (Supp. 1997). Included in this enactment was

[2]At the time of petitioner's guilty plea and incarceration the method of post-conviction review was by way of filing a writ of error coram nobis under the now repealed MISS. CODE ANN. §99-35-145.

a three year statute of limitations to the presentation of post-conviction claims. MISS. CODE ANN. §99-39-5 (2), reads:

> A motion for relief under this chapter shall be made within three (3) years after the time in which the prisoner's direct appeal is ruled upon by the Supreme Court of Mississippi or, in case no appeal is taken, within three (3) years after the time for taking an appeal from the judgment of conviction or sentence has expired, or *in case of a guilty plea, within three (3) years after entry of the judgment of conviction*. Excepted from this three-year statute of limitations are those cases in which the prisoner can demonstrate either that there has been an intervening decision of the Supreme Court of either the State of Mississippi or the United States which would have actually adversely affected the outcome of his conviction or sentence or that he has evidence, not reasonably discoverable at the time of trial, which is of such nature that it would be practically conclusive that had such been introduced at trial it would have caused a different result in the conviction or sentence. Likewise excepted are those cases in which the prisoner claims that his sentence has

> expired or his probation, parole or conditional release has been unlawfully revoked.
>
> [Emphasis added.]

This new post-conviction procedure went into effect on April 17, 1984. In interpreting this provision the Mississippi Supreme Court held that any convict that had been convicted prior to April 17, 1984, had three years from that date, or until April 17, 1997, to file a motion for post-conviction relief or be forever barred from filing a post-conviction motion. ***Odom v. State***, 483 So.2d 343 (Miss. 1986). Trest did not avail himself of the extension of time to file a challenge to his guilty pleas entered in 1976. Trest had eleven years in which to challenge his Mississippi convictions, but did not do so.

In 1979, the year after being released from his Mississippi convictions Trest was again involved with the

law. He was convicted of armed robbery in Louisiana and the prior Mississippi convictions were used to enhance his sentence as a multiple offender to 35 years without the benefit of parole. Even after his Louisiana conviction and sentence, Trest had from 1979 until 1987 to challenge his prior Mississippi convictions that formed the basis of his enhanced sentence. He did not do so.

Not until 1990, almost three years after the Mississippi statute of limitations expired did Trest choose to raise any claim regarding the Mississippi convictions. He then raised claims in Louisiana based on the failure to be informed of his right to appeal and the right to appointed counsel of appeal on the Mississippi.[3]

Prior to the decision in ***Trest***, the Fifth Circuit had

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[3]As pointed out above Trest had no right of appeal from his guilty pleas, thus no right to counsel on appeal for his Mississippi convictions.

been presented with a challenge to the application of Mississippi's three year statute of limitations in the context of habeas review. The Fifth Circuit found that Mississippi strictly enforces the three year statute of limitations found in §99-39-5. ***See Sones v. Hargett***, 61 F.3d 410 (5th Cir. 1995).[4]

The question then becomes whether or not the Court of Appeals has the authority to raise a procedural bar to a claim *sua sponte*. Amici States would submit that this Court has already given the federal courts direction in this regard. The Court has spoken to the issue in the context of exhaustion of state court remedies. ***Granberry v. Greer***, 481 U.S. 129 (1987). In

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[4]In only one limited type of claim is the three year statute of limitations disregarded. That is were the sentence imposed on a convict is more than the statutory maximum. In those cases the Supreme Court of Mississippi will allow the filing of a post-conviction motion notwithstanding the three year statute of limitations.

Granberry, the Court held that a federal court considering a habeas petition containing unexhausted issues should determine whether the "interest of justice would be better served by addressing the merits of the habeas petition or by requiring additional state proceedings before doing so." *Id.* at 136. The decision in *Granberry* came in the face of the failure of the state to raise a nonexhaustion issue. Likewise, the case at bar presents a case were the state has arguably failed to raise a procedural bar issue.

Amici States contend that the rule announced in *Granberry* rule should be extended to apply in the case of a procedural bar. A federal habeas court, including a federal court of appeals considering an appeal from the denial of a habeas petition, should be allowed to *sua sponte* raise a valid procedural bar to the consideration of

a claim if the interest of justice would be better served by addressing the claim on that ground rather than sending the case back for further consideration in the state courts. The Court of Appeals in this case, correctly recognized that the interest of finality, comity and federalism would best be served by holding that the claim was procedurally barred from consideration, because petitioner could not obtain relief from his Mississippi convictions. Because of its dealings with the laws of Mississippi, the Court of Appeals was fully aware that petitioner had forfeited his right to challenge his prior convictions in the State of Mississippi by refusing to attack those convictions within the time allowed under MISS. CODE ANN. §99-39-5.

This Court has spoken to the issue of raising procedural bars *sua sponte*. In ***Teague v. Lane***, 489 U.S. 288 (1989), this Court held that the petitioner had

never properly presented the claim in state court and held the claim barred:

> Our application of the procedural default rule here is consistent with ***Harris v. Reed***, 489 U.S. 255, 263, 109 S.Ct. 1038, 1043, 103 L.Ed.2d 308 (1989), which holds that a "procedural default does not bar consideration of a federal claim on either direct or habeas review unless the last state court rendering a judgment in the case 'clearly and expressly' states that its judgment rests on a state procedural bar" (citations and internal quotations omitted). *The rule announced in **Harris v. Reed** assumes that a state court has had the opportunity to address a claim that is later raised in a federal habeas proceeding. It is simply inapplicable in a case such as this one, where the claim was never presented to the state courts. See id.*, at 268-270, 109 S.Ct., at 1046-1047 (O'CONNOR, J., concurring).
>
> 489 U.S. at 297-99. [Emphasis added.]

In ***Harris v. Reed***, 489 U.S. 255 (1989), decided the same day, the Court addressed the prerequisites for a procedural default to be recognized in federal habeas. In

this opinion the "plain statement" rule of ***Michigan v. Long***, 463 U.S. 103 (1983), was adopted as the determining factor whether a claim had been held to be procedurally defaulted by the state courts. However, in Justice O'Connor's concurring opinion we find the following language:

> A contrary rule would make no sense. It would require a "plain statement" indicating state reliance on a procedural bar where no state court was ever given the opportunity to pass on either the procedural posture or the merits of the constitutional claim. Moreover, dismissing such petitions for failure to exhaust state court remedies would often result in a game of judicial ping-pong between the state and federal courts, as the state prisoner returned to state court only to have the state procedural bar invoked against him. *See **Fay v. Noia***, 372 U.S. 391, 435, 83 S.Ct. 822, 847, 9 L.Ed.2d 837 (1963); ***Williams v. Brantley***, *supra*, at 1385-1386 ("We refuse to contribute further needless and delaying requirements to a procedure that already often results in shuttling prisoners back and forth between the state and federal courts

before any decision on the merits is ever reached"). Finally, such a rule would create an incentive to proceed immediately to federal court, bypassing state postconviction remedies entirely in the hope that the lack of a state court decision as to the applicability of the State's procedural bar would be treated as "ambiguity." Such a result would not only run counter to the decisions of this Court, *see* ***Rose***, *supra*, at 518-519, but would also frustrate the congressional purpose embodied in § 2254.

In sum, it is simply impossible to "[r]equir[e] a state court to be explicit in its reliance on a procedural default," *ante*, at 1044, where a claim raised on federal habeas has never been presented to the state courts at all. In such a context, federal courts quite properly look to, and apply, state procedural default rules in making the congressionally mandated determination whether adequate remedies are available in state court.

489 U.S. at 269-70.

Thus, both in ***Teague*** and ***Harris*** it was recognized that the federal courts could and should apply state procedural

bars *sua sponte* under certain circumstances. Thus it seems that the Court has already recognized that in some instances that the federal courts may impose state procedural default rules on habeas corpus review without the claim ever being raised in state court. This is a logical extension of the rule announced in ***Granberry*** regarding exhaustion.

This is same policy consideration was present in ***Castille v. Peoples***, 489 U.S. 346 (1989), where this Court was discussing the meaning of fair presentation of an issue to the state courts. The Court held:

> It follows from what we have said that it was error for the Court of Appeals to rest a conclusion of exhaustion upon respondent's presentation of his claims in petitions for allocatur. *The requisite exhaustion may nonetheless exist, of course, if it is clear that respondent's claims are now procedurally barred under Pennsylvania law. See, e.g.*, ***Engle v. Isaac***, 456 U.S. 107, 125-126, n. 28, 102

S.Ct. 1558, 1570-1571, n. 28, 71 L.Ed.2d 783 (1982); ***Teague v. Lane***, 489 U.S. 288, 297-298, 109 S.Ct. 1060, 1068, 103 L.Ed.2d 334 (1989). We leave that question for the Court of Appeals. The judgment of the Third Circuit is reversed, and the case is remanded for further proceedings consistent with this opinion.

489 U.S. at 351-52. [Emphasis added.]

Thus it seems clear that a Court of Appeals is empowered to raise a procedural bar if it would be futile to send the case back to state court for a determination of whether a claim was exhausted or procedurally barred from consideration.

More recently in ***Gray v. Netherland***, ___ U.S. ___, 116 S.Ct. 2074, 135 L.Ed.2d 457, (1996), this Court held:

> *Petitioner's failure to raise his* ***Brady*** *claim in state court implicates the requirements in habeas of exhaustion and procedural default.* 28 U.S.C. § 2254(b) bars the granting of habeas corpus relief

> "unless it appears that the applicant has exhausted the remedies available in the courts of the State." Because "[t]his requirement ... refers only to remedies still available at the time of the federal petition," ***Engle v. Isaac***, 456 U.S. 107, 125, n. 28, 102 S.Ct. 1558, 1570, n. 28, 71 L.Ed.2d 783 (1982), *it is satisfied "if it is clear that [the habeas petitioner's] claims are now procedurally barred under [state] law,"* ***Castille v. Peoples***, 489 U.S. 346, 351, 109 S.Ct. 1056, 1060, 103 L.Ed.2d 380 (1989). However, the procedural bar which gives rise to exhaustion provides an independent and adequate state-law ground for the conviction and sentence, and thus prevents federal habeas corpus review of the defaulted claim, unless the petitioner can demonstrate cause and prejudice for the default. ***Teague v. Lane***, *supra*, at 298, 109 S.Ct., at 1068-1069; ***Isaac***, *supra*, at 125, n. 28, 129, 102 S.Ct., at 1570, n. 28, 1572; ***Wainwright v. Sykes***, 433 U.S. 72, 90-91, 97 S.Ct. 2497, 2508-2509, 53 L.Ed.2d 594 (1977).
>
> 116 S.Ct. at 2080. [Emphasis added.]

In the case at bar we have a claim that is technically exhausted because it would be found to be procedurally

barred by the Supreme Court of Mississippi. Thus the Court of Appeals was correct in holding that petitioner could not challenge his prior Mississippi convictions in the Mississippi courts because it would be held procedurally b d.

The challenge to the Louisiana enhanced sentence is thus procedurally barred because the underlying Mississippi convictions are not assailable in the Mississippi courts or the Louisiana courts. Louisiana was entitled to rely on these prior convictions to enhance his sentence for robbery.

While the Court of Appeals declined to address the claim in light of ***Custis v. United States***, 511 U.S. ___, 114 S.Ct. 1732, 128_L.Ed.2d 1732 (1994), the conclusion of this Court there is worth noting. The Court stated:

> We recognize, however, as did the Court of Appeals, *see* 988 F.2d, at 1363, that Custis, who is still "in custody" for purposes of his state convictions at the time of his federal sentencing under §924(e), may attack his state sentences in Maryland or through federal habeas review. ***See Maleng v. Cook***, 490 U.S. 488, 109 S.Ct. 1923, 104 L.Ed.2d 540 (1989). If Custis is successful in attacking these state sentences, he may then apply for a reopening of any federal sentence enhanced by the state sentences. We express no opinion on the appropriate disposition of such an application.

114 S.Ct. at 1739.

Trest is not still in custody under his Mississippi convictions. Trest entered his guilty pleas to these crimes over twenty years ago and has been barred from challenging these convictions for over ten years by MISS. CODE ANN. §99-39-5. Thus he cannot attack the prior convictions in the Mississippi courts. Further, in any federal habeas corpus petition attacking these Mississippi

guilty pleas the federal courts would be bound to recognize the fact that Trest has defaulted his right to attack his Mississippi convictions by failing to file the claims within the time period allowed. Thus, the Court of Appeals was avoiding a ping pong match between state and federal courts and for that matter between the courts of sister states. The Court of Appeals was fully capable and correctly determined the fact that the claim was procedurally barred from consideration due to petitioner's failure to attack the Mississippi convictions. Louisiana has the right to rely on the convictions imposed by the State of Mississippi or any other state for enhancement purposes without going behind the face of the conviction.[5]

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[5]There would be no problem with ***Custis*** as petitioner was admittedly represented by counsel during his Mississippi guilty pleas.

The Fifth Circuit clearly decided the interest of justice would be better served by addressing the claim raised in the habeas petition on appeal. By holding the claim was procedurally barred, the Court of Appeals was promoting judicial economy, the interest of federalism, comity and finality of state court judgments. It was correct in not requiring additional state proceedings before doing ruling on the case. Every case that this Court has decided that touches on this question gives the lower federal courts the right to impose a state procedural bar, *sua sponte* if necessary, and deny habeas corpus relief.

The Court should extend the rule announced in ***Granberry*** and alluded to in ***Teague, Harris*** and ***Castille***, to cases in which the Court of Appeals determines that it can quickly resolve a case by applying a state procedural

bar without requiring further state court action. The Courts of Appeal are clearly familiar with the procedural law within their circuits and are cognizant of the application of the procedural default rules of the states over which they have jurisdiction. Such an extension of the *Granberry* rule would not offend the Constitution or the rights of habeas petitioners.

The adoption of such a rule would promote the finality of state court judgments, comity, federalism and judicial economy.

CONCLUSION

For the above and foregoing reasons the amici states would submit that the decision of the Court of Appeals for the Fifth Circuit be affirmed.

Respectfully submitted,

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